TRANSCRIPT OF RECORD

(23,511)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 433.

JOHN T. REYNOLDS, PLAINTIFF IN ERROR,

vs.

WILLIAM M. FEWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 15, 1914.

a *Return to Writ.*

STATE OF OKLAHOMA,
Supreme Court:

In obedience to the commands of the within Writ of Error, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof, I hereto set my hand and affix the seal of said court, at Oklahoma City, this 8th day of January, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

1 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to William M. Fewell, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Oklahoma, wherein John T. Reynolds is designated as plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma this 19th day of December, A. D. 1912.

[Seal Supreme Court, State of Oklahoma.]

JOHN B. TURNER,
Chief Justice of the Supreme Court of Oklahoma.

Attest:
W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

STATE OF OKLAHOMA,
City of Tulsa, County of Tulsa:

I, the undersigned attorney of record for the defendant in error of the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error

in the Supreme Court of the United States. Dated this 20 day of December, 1912.

HENRY B. MARTIN,
Attorney for Defendant in Error.

2 [Endorsed:] No. 1680. John T. Reynolds, plaintiff in error, v. William M. Fewell, defendant in error. Citation. William R. Lawrence, attorney at law, Muskogee, Okla. Filed Dec. 21, 1912. W. H. L. Campbell, Clerk.

3 In the Supreme Court of the State of Oklahoma.

No. —.

JOHN T. REYNOLDS, Plaintiff in Error,
v.
WILLIAM M. FEWELL, Defendant in Error.

Petition for Writ of Error.

Comes now the above named plaintiff in error and says that on the 19th day of March, 1912, judgment in this cause was entered by this Court against John T. Reynolds, plaintiff in error, and thereafter a petition for rehearing was filed, presented, considered, and on the 4th day of June, 1912, denied by this Court, whereupon said judgment became final; that said John T. Reynolds, Plaintiff in error, was and is aggrieved in that, in said judgment and proceedings had prior thereto in this case, certain errors were committed to his prejudice; that this is an action brought under the statutes of the United States relating to the control, disposition and allotment of the public lands of the Muscogee or Creek Tribe of Indians of the late Indian Territory, and the descent of the same, where a citizen of that tribe duly enrolled and entitled to allotment, died before receiving the same, and the right of the defendant in error, herein to acquire right of possession, to the tract of land in dispute being the same allotted to the heirs of said decedent, without further
4 or other description or designation under and by means of an agricultural lease executed to him by the father of the deceased, who, being a non-citizen of said tribe, and the said deceased being a citizen thereof, of Indian blood of said tribe, and said father claiming to be the nearest of kin of said deceased, surviving her, and by reason thereof her sole heir at law and entitled to have and hold the absolute title thereto under the said law of descent thereby drawing in question the construction of certain statutes and laws of the United States relating to said descent of said public lands so allotted and which this court has construed in favor of the inheritance of said land being in the father, by and through whom, by virtue of said agricultural lease this defendant in error is entitled to have and to hold the immediate possession of said land as against the possession of this plaintiff in error, who claims the right of possession under an absolute deed executed to him by the maternal aunt

of said deceased and an enrolled citizen of said Creek Nation of Creek Indian blood, and nearest of kin to said deceased of said blood, all of which will more fully appear in detail from the assignment of errors herein.

Wherefore said plaintiff in error prays a writ of error may issue to the Supreme Court of the State of Oklahoma for the correcting of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

WILLIAM R. LAWRENCE,
Attorney for Plaintiff in Error.

5 [Endorsed:] No. 1680. John T. Reynolds, plaintiff in error, v. William M. Fewell, defendant in error. Petition for writ of error. William R. Lawrence, attorney and counselor at law, second floor Iowa Building, Muskogee, Okla. Filed Dec. 19, 1912. W. H. L. Campbell, Clerk.

6 In the Supreme Court of the United States.

No. —.

JOHN T. REYNOLDS, Plaintiff in Error,
v.
WILLIAM M. FEWELL, Defendant in Error.

Assignment of Error on Writ of Error to State Court.

Comes now the plaintiff in error in above entitled cause, and shows and avers that in the record and proceedings in said cause, the Supreme Court of the State of Oklahoma erred to the grievious injury and wrong of the said plaintiff herein to the prejudice and against the rights of the said plaintiff in the following particulars:

First. The said Supreme Court erred in holding and adjudging, under the agreed statement of facts in said cause, the evidence appearing in the record, undisputed, and the statutes and laws of the United States relating to the allotment in severalty of the public lands of the Muscogee or Creek Nation of Indians, among the enrolled members of that tribe, and the descent of the same, in certain cases, as provided by an act of Congress entitled "An act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians" (31 S. L. 861), and particularly set forth in Section 28 thereof, that said defendant in error had and held the legal right to the immediate possession of the 160 acres of land in controversy in this cause under and by virtue of an agricultural lease for five years, executed to said defendant in error, by the father of a deceased member and citizen of said tribe, duly enrolled and entitled to an allotment of 160 acres out of the said public lands, and
7 being of the blood of said tribe, born February 22, 1889, and who died before receiving her said allotment, and afterward allotted to the heirs of said deceased, as provided by said act

of Congress, and conveyed to them by such description only, and being the land in controversy herein, and said father claiming to be the sole heir of said deceased, and thereby the owner in fee-simple of said 160 acres of land though conceded and shown by said agreed statement of facts, to be a non-citizen of said Nation of Indians, not enrolled as a member thereof, and not entitled to enrollment as such, as against the actual possession of said land by the plaintiff in error, claiming the legal right thereto under and by virtue of a deed conveying to him full title to said land by a maternal aunt of said deceased, of the blood of said tribe of Indians and the nearest of kin to said deceased having said Indian blood, as set forth and admitted by the agreed statement of facts and the undisputed evidence contained in the record.

Second. That said Supreme Court erred in not reversing the judgment of the trial Court, and in not giving plaintiff in error his rights under the statutes and laws of the United States as the legal and bona fide owner in fee of said described land.

Wherefore for these and other manifest errors appearing on the face of the record, the said John T. Reynolds, the plaintiff in error, prays that the judgment of the Supreme Court of the State of Oklahoma be reversed, set aside and held for naught and that judgment be rendered for plaintiff granting him his rights under the statutes and laws of the United States, and that he also have judgment for his costs.

WILLIAM R. LAWRENCE,
Attorney for Plaintiff in Error.

8 [Endorsed:] No. 1680. John T. Reynolds, plaintiff in error, vs. William M. Fewell, defendant in error. Assignment of error on writ of error. William R. Lawrence, attorney at law, Muskogee, Okla. Filed Dec. 19, 1912. W. H. L. Campbell, Clerk.

9 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable — of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Oklahoma, before you at the March sitting of the — Term, 1912, between John T. Reynolds, plaintiff in error, versus William M. Fewell, defendant in error, a manifest error has happened to the great damage of the said plaintiff in error, as by his petition appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do commend you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you

have the said record — proceedings aforesaid at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before thirty days from the date hereof to the end that the records and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done thereon to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 20th day of December 1912.

Done in the City of Muskogee with the seal of the District Court of the United States for the Eastern District of Oklahoma.

[Seal of the United States District Court, Eastern District of Oklahoma.]

10 R. P. HARRISON,
Clerk District Court United States,
E. District of Oklahoma.

Allowed:
JOHN B. TURNER,
Chief Justice of the Supreme Court
of the State of Oklahoma.

In the Supreme Court of Oklahoma.

JOHN T. REYNOLDS
vs.
WILLIAM M. FEWELL.

I, W. H. L. Campbell, Clerk of the Supreme Court of Oklahoma, do hereby certify that on the 21" day of December 1912, a copy of the foregoing writ of error for the defendant in error was lodged in my office at Oklahoma City, Oklahoma.

Witness my hand and the seal of said Court this 21" day of December 1912.

[Seal Supreme Court State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court,
By JESSIE PARDOE, *Deputy.*

11 [Endorsed:] No. 1680 John T. Reynolds Plaintiff in Error v. William M. Fewell Defendant in Error Writ of Error Filed Dec. 21 1912 W. H. L. Campbell, Clerk William R. Lawrence, attorneys at law Muskogee, Okla.

12 In the Supreme Court of the State of Oklahoma.

No. —.

JOHN T. REYNOLDS, Plaintiff in Error,
vs.
WILLIAM M. FEWELL, Defendant in Error.

Allowance of Writ.

Comes now John T. Reynolds, Plaintiff in Error above-named on this 19th day of December, A. D. 1912, and filed and presents to this court his petition, praying for the allowance of a writ of error intended to be urged by him; and praying further, that a duly authenticated transcript of the records, proceedings and papers, upon which the judgment herein was ordered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented,

It is ordered by this Court that a writ of error be allowed, as prayed; Provided, however, that the said John T. Reynolds, plaintiff in error, give bond, according to law, in the sum of One Thousand Five Hundred $1,500.00 Dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 19" day of December, A. D. 1912.

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.* [SEAL.]

Endorsed on back: 1680 John T. Reynolds, Plaintiff in error vs. William M. Fewell, Defendant in error, Allowance of Writ of Error, Filed Dec. 19 1912, W. H. L. Campbell, Clerk.

13 In the Supreme Court of the United States.

No. —.

JOHN T. REYNOLDS, Plaintiff in Error,
vs.
WILLIAM M. FEWELL, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents; That we, John T. Reynolds of the County of Tulsa, State of Oklahoma, as principal, and David

Shipmen and J. P. Harter of the County of Tulsa, State of Oklahoma, as sureties, are held and firmly bound unto the above named William M. Fewell, in the sum of Fifteen Hundred Dollars ($1,500.00) to be paid to him, and for the payment of which, well and truly to be made, we bind ourselves, and each of us, our, and each of our heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 10th day of September, in the year of our Lord, One Thousand Nine Hundred and Twelve.

Whereas, the above named John T. Reynolds plaintiff in error, seeks to prosecute his writ of error in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his writ of error to effect, and answer all cost and damages that may be adjusted if they shall fail to make good their plea; then this obligation to be void, otherwise to remain in full force and virtue.

JOHN T. REYNOLDS.
DAVID SHIPMAN.
J. P. HARTER.

14 STATE OF OKLAHOMA,
Tulsa County, ss:

David Shipman and J. P. Harter *and* whose names are subscribed as surety to the above bond, being severally and duly sworn, each for himself says: That he is a resident and freeholder of the State of Oklahoma and is worth more than the sum in the said bond specified as the penalty thereof, over and above all his just debts and liabilities, in property, not by law exempt from execution in this state.

DAVID SHIPMAN.
J. P. HARTER.

Subscribed and sworn to before me this 10th day of September, 1912.

[SEAL.] RAY S. FELLOWS,
Notary Public.

My commission expires Nov. 18, 1915.

This bond approved this 19th day of December, A. D. 1912

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

Endorsed on back: 1680. Reynolds, Pl'ff in Error, vs. Fewell, Def't in Error. Bond on Writ of Error. Filed Dec. 19, 1912. W. H. L. Campbell, Clerk.

15 In the Supreme Court of the State of Oklahoma.

Filed May 13, 1910. W. H. L. Campbell, Clerk.

1680.

JOHN T. REYNOLDS, Plaintiff in Error,
vs.
WILLIAM M. FEWELL, Defendant in Error.

Petition in Error.

Plaintiff in error complains of said defendant in error, in this that said defendant, at the April Term, 1909, of the District Court of Tulsa County, said State, recovered the judgment of said District Court against this plaintiff in error, in a certain action in said Court wherein this plaintiff was defendant and said defendant was plaintiff. A certified transcript of the record of said action therein, and as well of the original case made, duly certified is attached hereto and made a part of this petition in error, and said plaintiff avers that there is error in the said record and proceedings, in this:

(1) Error of the Court in refusing to vacate judgment and overruling the motion for new trial.

(2) Error of the Court in distinguishing in its findings for value of improvements made before the commencement of the ac-
16 tion and after the commencement of the action, and, as well, before this plaintiff had notice that George Solander claimed to be the onwer of the land, because under the law and the evidence, the Court should have found for the total value of betterments and taxes paid, being the sum of $2,900.00, in round numbers, and have found in favor of this plaintiff, the excess in value of betterments, and taxes paid, above the rents and profits, which the Court found to be $600.00, leaving a balance of $1,797.00 due this plaintiff therefor, for which he was entitled to judgment on his set off.

(3) Error of the Court in holding, as a matter of law, that this plaintiff in error was only entitled to set-off the value of betterments, placed upon the land in question prior to the commencement of the action, and only to the value of the rents and profits, because under the law and the evidence this plaintiff was entitled to judgment for the excess of value of betterments and taxes paid above the rents and profits.

(4) Error of the Court in finding and holding, under the law and the evidence, and the agreed statement of facts, that the Creek law of descent, and the provisions of section 28 of an Act of Congress of the United States, entitled "An Act to ratify and confirm an agreement with the Muscogee or Creek Tribe of Indians, and for other purposes", approved March 1, 1901, being so much of said section as reads:

"All citizens who are living on the first day of April, eighteen hundred and ninety nine, entitled to be enrolled under section

twenty one of the Act of Congress, approved June twenty
17 eight, eighteen hundred and ninety eight, entitled "An act for the protection of the people of Indian Territory, and for other purposes", shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died, or may hereafter die before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly", that George Solander, a non citizen of the Creek Nation, took by inheritance the allotment of his said deceased daughter, Hettie L. Solander, her said allotment being the land in controversy in this action.

(5) Error of the Court in not construing the Creek law of descent, under said act of Congress, and the evidence produced of the law of such descent to be that only a citizen or citizens of the Creek Nation, could inherit said allotment, and holding that thereunder, Phœbe B. Trusler, a Creek citizen, the aunt of said allottee, Hettie L. Solander, and the grantor of this plaintiff in error, was the sole heir at law of said allotment of land and said plaintiff as her said grantee became and was the owner *if* fee of said allotment and entitled to the possession of same.

(6) Error of the Court in not rendering judgment in favor of plaintiff in error against defendant in error for the costs.

(7) The Court erred in excluding evidence offered by the plaintiff in error.

(8) The Court erred in receiving evidence on behalf of defendant in error over the objection of this plaintiff in error to
18 which ruling he then and there duly excepted.

(9) Error of the Court in overruling the objection of plaintiff in error to the admission in evidence, on behalf of defendant in error, of the supposed agreed statement of fact- marked said defendant's Exhibit "A", and as well the ruling thereupon made by the Court, as follows: "You may off-set the rents and profits by improvements placed on the land to the amount of the rents." To all of said rulings this plaintiff then and there duly excepted.

Wherefore the plaintiff in error prays that said judgment so rendered may be reversed, and a judgment rendered in favor of the plaintiff in error and against the defendant in error, upon the pleadings, agreed statement of facts, the evidence and the law, for the costs and for such other relief as to the Court may seem just.

JOHN T. REYNOLDS,
Plaintiff in Error,
By His Attorney, WILLIAM R. LAWRENCE.

19 Filed Aug. 21, 1909. W. W. Stuckey, Clerk District Court.

STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court Within and for Tulsa County, State of Oklahoma.

No. 1123.

WILLIAM M. FEWEL, Plaintiff,
vs.
JOHN T. REYNOLDS, HARVEY L. HOLLINSWORTH, Defendants.

Case Made.

Be it Remembered, that heretofore, to-wit on the 10th day of November, 1905, said plaintiff, William M. Fewel, commenced this action against said defendants by filing in the United States Court for the Western District of the Indian Territory at Sapulpa in said District his petition, which was in the words and figures following:

In the United States Court for the Western District of the Indian Territory, Sitting at Sapulpa, December Term, 1905.

WILLIAM M. FEWEL, Plaintiff,
vs.
JOHN T. REYNOLDS and HARVEY L. HOLLINSWORTH, Defendants.

Complaint at Law.

The plaintiff states that he is a resident of the City of Tulsa, in the Western District of the Indian Territory and that the defendant, John T. Reynolds is a resident of the Western District
20 of the Indian Territory, residing near the City of Tulsa and that the defendant, Harvey L. Hollinsworth resides near the town of Broken Arrow in the Western District of the Indian Territory, and that all of said parties reside nearer and more convenient to Sapulpa than to any town where a United States Court is held in the Western District.

Plaintiff brings this suit in ejectment against said defendants, and for cause of action says, that he is the owner of a lease hold interest in and is entitled to the immediate possession of the following described lands, lying in the Western District of the Indian Territory and described as follows: to-wit, the North half of the Northwest quarter of Section Two, Township Seventeen North, Range Thirteen East. Also the Southeast quarter of Section Thirty, Township Nineteen North, Range Thirteen East.

Plaintiff states that he claims the right to the possession of said lands as follows:

First. Minnie Solander was a duly enrolled citizen of the Creek tribe of Indians, in the Indian Territory, and as such was entitled to an allotment of One Hundred and Sixty acres of land in the division of the lands of said tribe of Indians.

Second. The said Minnie Solander was on the — day of ——, 1898, duly and legally married to Geo. A. Solander and there was born to them as the issue of the marriage, one child, a daughter named Hettie L. Solander. Said Hettie L. Solander was born on the — day of ——,1899, and was a duly and regularly enrolled citizen of the Creek tribe of Indians, and as such was entitled to an allotment of 160 acres of land as her approximate share of the lands of said tribe.

Third. On the 8th day of October, 1899, said Minnie Solander died intestate in the Western District of the Indian Territory, and left surviving her, as her only heirs at law, her daughter, Hettie L. Solander and her husband, George A. Solander, each of
21 whom upon her death inherited a one-half interest in the allotment of land to which said Minnie Solander was entitled as a citizen of the Creek Nation.

Fourth. On the 17th day of November, 1899, said Hettie L. Solander, the only child of said Minnie Solander, died intestate, unmarried and without issue, and left surviving her the said George A. Solander, her father, who was and is her only heir at law; and the said George A. Solander inherited the entire estate of his said child Hettie L. Solander, and became the owner in fee of the entire allotment to which his said wife, Minnie Solander and his said daughter, Hettie L. Solander, were entitled as citizens of the Creek tribe of Indians.

Fifth. On the 5th day of May, 1903, after the death of Minnie Solander, an allotment deed was duly and regularly issued by the Principal Chief of the Creek Nation, to the heirs of Minnie Solander, for the following described lands, which are the lands set apart and allotted to said heirs as the approximate share of the said Minnie Solander in the division of the lands of said Creek tribe of Indians, to-wit: The North Half of the Northwest quarter and the South Half of the Southeast quarter of Section two, Township seventeen North, Range thirteen East. Said lands being situated in the Creek Nation and in the Western District of the Indian Territory.

On the 5th day of May, 1903, after the death of Hettie L. Solander, an allotment deed was duly and regularly issued by the Principal Chief of the Creek Nation to the heirs of said Hettie L. Solander for the following described tract of land, situated in the Creek Nation and in the Western District of the Indian Territory, which land was set apart and allotted to said heirs as the approximate share of the said Hettie L. Solander in the division of the lands of said Creek tribe of Indians and is described as follows, to-wit:

The Southeast quarter of Section Thirty, Township Nineteen
22 North, Range Thirteen East. Plaintiff can not file copies of said deeds at this time for the reason that he has not the same in his possession, but he will file copies of the same on or before the hearing of this cause.

Sixth. That on the 7th day of September, 1905, said George A. Solander executed and delivered to the plaintiff for a valid consideration a lease for a term of five years from date upon all of the above described lands, including the entire allotments of his deceased wife, Minnie Solander, and his deceased child, Hettie L. Solander, which said lease was duly acknowledged, executed and recorded in Book R. page 529, in the office of the Recorder of Deeds at Sapulpa, Indian Territory. A copy of said lease is herewith filed and marked exhibit "A" and made a part hereof.

The defendants John T. Reynolds and Harvey L. Hollingsworth are in the unlawful possession of the following described portions of said lands, to-wit: The North half of the Northwest quarter of Section Two, Township Seventeen North, Range Thirteen East, and the Southeast quarter of Section Thirty, Township Nineteen North, Range Thirteen East.

Plaintiff states that by reason of the said wrongful possession of said lands by said defendants he has sustained damages in the sum of $5000.00.

Wherefore he prays judgment for the recovery of said lands and for the possession thereof, and for said damages for the unlawful detention of the same..

McDOUGAL & WALKER,
Attorneys for the Plaintiff.

William M. Fewel says that he believes that the statements in the foregoing complaint are true.

WILLIAM M. FEWEL.

Subscribed and sworn to before me this the 7th day of November, 1905.

[SEAL.] B. F. PETTUS,
Notary Public.

My commission expires September 9th, 1908.

23 *Agricultural Rental Contract.*

This agreement made and entered into this day, the 7th of September, 1905, by and between Geo. A. Solander, party of the first part, and William M. Fewel, party of the second part. George A. Solander does hereby rent to William M. Fewel for five years from this date for agricultural purposes the following described piece of land: All of the South ½ of the S. E. ¼ and all of the N. ½ of the N. W. ¼ of Sec. 2, Township 17 North and Range 13 East, being all of the allotment of my deceased wife Minnie Solander who died in Sept. 1899 and left only one child, Hettie L. Solander and myself as heirs.

Also I lease with the above all of the S. E. ¼ of Sec. 30, Town. 19 North, Range 13 East. The same being the allotment of my deceased daughter who died in Feb. 1900. All of the above described land is in the Creek Nation and in the Western Judicial District of the Indian Territory.

The consideration of this contract is a cash one, of Five Hundred dollars, the receipt of which is hereby acknowledged and in consider ation of the payment of the said money to me, the said William M. Fewel is to have full use and control of all of the above described 320 acres (more or less) for the term of five years from this date, Sept. 7th, 1905, and is to have full benefit and use of all improvements and may alter or change any of said improvements to suit himself and may use any and all timber as he may choose. He may collect rent for any crop now on said land and has all rights to use said land and improvements in any way that may best suit him. It is further agreed that the said William M. Fewel may bring suit in my name if he so desires to dispossess any one, who may now be on said land, or on any part of said land.

(Signed) GEORGE A. SOLANDER.

Witnesses:

B. F. PETTUS.
R. M. AUSTIN.

24 UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

Be it remembered, That on this day came before me a Notary Public within and for the Western District of the Indian Territory aforesaid, duly commissioned and acting, George A. Solander to me well known as the grantor in the foregoing agricultural lease, and stated that he had executed the same for the purposes and consideration therein mentioned and set forth.

Witness my hand and seal as such Notary Public, on this the 11th day of Sept. 1905.

(Signed) H. W. RANDOLPH,
Notary Public.

My commission expires Aug. 20th, 1908.

462. William M. Fewel vs. John T. Reynolds and Harvey L. Hollingsworth. Complaint at Law. Filed Nov. 10, 1905. R. P. Harrison, Clerk, Western District. McDougal & Walker, Attorneys for Plaintiff.

25 And afterwards, to-wit, on the 2nd day of January, 1906, said defendant Harvey L. Hollingsworth, filed an answer to said petition, which answer is in words and figures following:

In the United States Court in and for the Western District of the Indian Territory, Sitting at Sapulpa.

WILLIAM M. FEWELL, Plaintiff,
against
JOHN T. REYNOLDS and HARVEY L. HOLLINGSWORTH, Defendants.

Answer of Defendant Harvey L. Hollingsworth.

Comes now Harvey L. Hollingsworth, one of above named defendants, and files his separate answer to plaintiff's complaint and states:

1. That he denies that he is in the unlawful possession of the following described tract of land, to-wit: The North half of the Northwest Quarter of Section Two (2), Township Seventeen (17) North, Range Thirteen (13), East, and the Southeast Quarter of Section Thirty (30), Township Nineteen (19) North, Range Thirteen (13) East, in the Creek Nation, Indian Territory, or any part of same.

2. Defendant further answering states that he is not now in possession of and that he never has been in the possession of and that he does not now and has never at any time claimed possess-opm pf saod above described tract of land or any part thereof.

3. Defendant denies that plaintiff has been damaged in the sum of Five Hundred dollars ($500.00) or any other sum by reason of this defendant being in the unlawful possession of said above described lands or any part thereof.

26 Wherefore, this defendant asks judgment of dismissal of this action as to this defendant and for his costs herein expended.

HAYMES & HOLT,
Attorneys for Harvey L. Hollingsworth.

Harvey L. Hollingsworth, being first duly sworn, deposes and says that he is the defendant answering above; that he has read the above answer and that the statements therein contained and set forth are true.

HARVEY L. HOLLINGSWORTH.

Subscribed and sworn to before me this 3rd day of January, 1906.
[SEAL.] F. S. HURD,
Notary Public.

My commission expires January 13th, 1907.

No. 462, Law. In the United States Court, Western District of the Indian Territory, Sitting at Sapulpa. William M. Fewell vs. John T. Reynolds and Harvey L. Hollingsworth. Answer of Defendant Harvey L. Hollingsworth. Filed Jan. 2, 1906. R. P. Harrison, Clerk, Western District.

27 And afterwards, to-wit, on the 16th day of January, 1906, said defendant, John T. Reynolds, filed an answer to said petition, which answer is in words and figures following:

In the United States Court, Western District, Indian Territory, Sitting at Sapulpa.

WILLIAM M. FEWELL, Plaintiff,
vs.
JOHN T. REYNOLDS and HARVEY L. HOLLINGSWORTH, Defendants.

Complaint at Law.

Answer of Defendant John T. Reynolds.

For answer to the complaint filed against him in this cause, the defendant, John T. Reynolds, says:

I.

This defendant denies that the plaintiff is the owner of a valid lease-hold interest in, and that he is entitled to the possession thereunder of any portion of the lands described in the complaint.

II.

This defendant admits that Minnie Solander and Hettie L. Solander were duly enrolled citizens of the Creek Nation, and were entitled to and received allotments of land of One Hundred and sixty acres each as their respective shares in the division of the lands of the Creek tribe of Indians, and that said lands are correctly described by the complainant.

III.

This defendant admits that on or about the 4th day of October, 1899, said Minnie Solander died intestate in the Western
28 District of Indian Territory, leaving surviving her as her only heir at law, her daughter, Hettie L. Solander; and that on or about the 17th day of December, 1899, said Hettie L. Solander, died intestate, unmarried and without issue.

IV.

This defendant also admits that allotment deeds were delivered to the heirs of both Minnie Solander and Hettie L. Solander after their respective deaths by P. Porter, Principal Chief of the Creek Nation, for the said lands to which each of said decedents were entitled, and that said lands are correctly described in said deeds.

V.

This defendant denies that George A. Solander, the lessor of plaintiff, and husband of Minnie Solander, deceased, and father of Hettie

L. Solander, also deceased, he being a non-citizen of the Creek Nation, I. T., and a white man, could inherit or take any interest, right or title whatsoever, upon the death of either or both said Minnie Solander and Hettie L. Solander, her daughter, in the allotments of lands to which said Minnie Solander and Hettie L. Solander — entitled as citizens of the Creek Nation, under and by virtue of the laws of Descent and Distribution in force in the Creek Nation and Indian Territory at the date of the death of said Minnie Solander and Hettie L. Solander.

VI.

This defendant denies the plaintiff's right of possession to any of said lands at the time his suit was filed or at any time under his alleged five years' contract from George A. Solander; and here alleges and avers that this defendant was in the lawful and peac-able possession of the 240 acres which he purchased and which he was holding under and by virtue of warranty deeds and title bond and agricultural contract, made, executed and delivered to him
29 by Phœbe B. Trusler, who, this defendant alleges to be the sole and rightful owner and heir to all of said lands allotted to both Minnie Solander, her deceased sister, and Hettie L. Solander, her niece and the daughter of Minnie Solander; and that under and by virtue of the laws of descent and distribution in force in the Creek Nation, Indian Territory, prior to and at the time of the death of both of said decedents, Minnie Solander and Hettie L. Solander, said Phœbe B. Trusler was the sole heir to the said estates, and upon their deaths passed by law to said Phœbe B. Trusler, in fee, she being the nearest relation by blood of the Creek tribe of Indians.

VII.

This defendant denies that he has ever been in unlawful possession of the lands as alleged in the plaintiff's complaint; and this defendant denies that he is now or has at any time wrongfully retained possession of said lands, and denies that the plaintiff is entitled to damages in the sum of five hundred dollars ($500.00) or any sum.

VIII.

This defendant further denies the plaintiff's right to possession to any portion of the lands purchased and owned by this defendant, because on the 7th day of September, 1905, when plaintiff took his said contract, he did so and accepted same with full knowledge and notice of defendant's rights and occupancy under his bond for deed, warranty deeds, contract and purchase, all of which instruments had been and were duly executed, signed, acknowledged and placed on record in the Recorder's office at Sapulpa, at the time and long before his said contract was made.

This defendant now denies generally all other allegations in said complaint not hereinbefore specifically admitted or denied, and

having now fully answered he prays to be hence dismissed with his reasonable costs.

JOHN T. REYNOLDS,
By MARS & MARS, *Att'ys.*

MARS & MARS,
Attorneys for Defendant John T. Reynolds.

30 UNITED STATES OF AMERICA,
Western District, Indian Territory:

John T. Reynolds being duly sworn upon his oath says, that he has read over the foregoing answer and knows the contents thereof, and that the same is true and correct.

JOHN T. REYNOLDS.

Subscribed and sworn to before me this 15 day of January, A. D. 1906.

LUSHER MARR,
[SEAL.] *Notary Public, Western District, I. T.*

My commission expires 2nd day of July, 1906.

No. 462. William M. Fewell, Plaintiff, vs. John Reynolds and Harvey L. Hollingsworth, Defendants. Answer of John T. Reynolds. Filed Jan. 16, 1906. R. P. Harrison, Clerk, Western District. Mars and Mars, Attorneys, Sapulpa, I. T.

31 And afterwards on the 3rd day of March, 1908, a stipulation was filed by the parties, plaintiff and defendants, in the District Court for Creek County, Oklahoma, to transfer this cause to Tulsa County, which stipulation is in words and figures following:

No. 462.

WM. M. FEWELL
vs.
JOHN T. REYNOLDS et al.

Come now the parties to this cause by their attorneys the plaintiff by McDougall & Walker his att'ys, and the defendants by Mars & Mars their attorneys, and agree that this cause may be and is transferred for trial to the District Court for the 21st Judicial District at Tulsa, Okla.

McDOUGAL & WALKER,
Att'ys for Plaintiff.
MARS & MARS,
Att'ys for Defendants.

462. Wm. M. Fewell vs. John T. Reynolds et al. Order of transfer. Filed in open court 3 of March, 1908. J. B. Summers, District Clerk.

32 And afterwards on the 18th day of March, an order was made by the District Court for Creek County upon said stipulation, in words and figures following.

462. Civil.

WM. M. FEWEL
vs.
JOHN T. REYNOLDS and HARVdY L. HOLLINSWORTH.

And on this day come the plaintiff and defendants herein by their respective attorneys and file an agreement for the transfer of this cause to the District Court of Tulsa County.

It is therefore ordered by the Court that this cause be and the same is hereby transferred to the District Court of Tulsa County; and the Clerk of this Court is hereby directed to transmit to the Clerk of the District Court of Tulsa County a transcript of all the proceedings had herein, together with all the papers herein.

No. 1123. Wm. M. Fewel vs. John T. Reynolds, et al. 21st Judicial District, Tulsa Co., Okla. Filed Dec. 14, 1908. W. W. Stucky, Clerk District Court.

33 And afterwards on the 14th day of December, 1908, the original papers and a transcript of the proceedings had in said cause were duly filed in the office of the Clerk of the District Court for Tulsa County.

And afterwards on the 22nd day of December, 1908, by leave of the court, said defendant, John T. Reynolds, filed an amendment to his answer in said cause, to which plaintiff objected and to ruling of the court in allowing said defendant to file said amendment to said answer plaintiff duly excepted, which said amendment is in words and figures following:

In the District Court of Tulsa County, State of Oklahoma.

No. 1123.

WILLIAM M. FEWELL, Plaintiff,
vs.
JOHN T. REYNOLDS, Defendant.

Amendment to Answer.

Defendant, by leave of court, amends his answer herein, that is to say: That he is now, and has been since about 1904 the actual occupant of the land in controversy, described as "The Hettie Solander Allotment," claiming to be the bona fide legal owner thereof under the lease, bond for deed, and warranty deed of Phœbe B. Trusler as set forth in the 16th paragraph of the agreed statement of facts filed herein, and has, during said time made permanent

and valuable improvements thereon, which has enhanced the market value of said land as follows:

Clearing 40 acres of timber at $12.50	$600.00
" 20 " " dead trees at $5.00	100.00
Digging 30 rods ditch	50.00
Making 400 rods 3-wire fence at 30c	120.00
34 Making and setting 800 fence posts at 10c	80.00
Making hog fence 40 rods at 30c	12.00
Planting 25 acres to timothy & clover, $2.50	62.50
" 4 " orchard	546.00
" 3½ " strawberries	1,050.00
" 35 grape vines	17.50
Log house and lean-to	125.00
Box house 14x20	50.00
	$2,913.00

And defendant asks that said sum of $2,913.00 be allowed him, less the reasonable rental value of said land for the years 1906, 1907 and 1908, and that he have judgment therefor as provided by the statute in such cases and for costs.

LAWRENCE & LAWRENCE,
Att'ys for Defendant.

1123. Fewell v. Reynolds. Amendment to Ans. Filed Dec. 22, 1908.

35 The issues having been fully joined this cause came on for trial on the 25th day of May, 1909, being a regular judicial day of the April 1909 term of said District Court for Tulsa County, and a jury being waived by the parties, said cause was tried to the Court. And thereupon on said 25th day of May, 1909, said action being duly called for trial, the said plaintiff appeared in person and by Hanier & Martin and J. J. Henderson, his attorneys, and said defendant, John T. Reynolds, appeared in person and by Lawrence & Lawrence, his attorneys, and thereupon the following evidence was introduced, the same being all the evidence introduced by both the parties at the trial:

36 STATE OF OKLAHOMA,
County of Tulsa:

Before the Hon. J. H. Pitchford, Judge.

In the District Court, April, 1909, Term of said Court, at Tulsa, Okla.

#1123.

WILLIAM FEWELL
vs.
JOHN T. REYNOLDS et al.

Appearances:

Hainer & Martin, Henderson, J. J., for plaintiff.
Lawrence & Lawrence and Mr. Booth, for defendants.

Now on this the 25th day of May, 1909, this cause coming on for hearing, a jury being waived by the parties here and agreed to try this cause to the court, whereupon the following proceedings are had, to-wit:

Mr. MARTIN: Plaintiff offers in evidence Exhibit A, the same being an agreed statement of facts between the parties to this suit.

Mr. LAWRENCE: The defendant objects to the same for the reason that it has not been placed on file in this court, and as not being mutual, as is shown by the agreement upon its face, and not being a fair presentation of the issues in the case.

(After argument by the parties, the Objection is by the Court over-ruled, to which the defendants excepted.)

Mr. LAWRENCE: Our objection we think is important, be-
37 cause paragraph eighteen, the court can see that it was changed after it was written.

(Mr. Lawrence, reads paragraph referred to; the change referred to being the addition of the words, in ink; "whatever," and later the addition of the words "which may be hereafter agreed upon or shown to be reasonable and right.")

The COURT: The objection will be over-ruled and you may offset the rents and profits by the improvements placed on the land, to the amount of the rents.

Mr. MARTIN: The plaintiff objects and excepts to the ruling of the court in allowing the defendant to offer proof upon their amended answer filed as to betterments and for improvements upon the premises in question.

Mr. LAWRENCE: We will also save an exception to the ruling.

(The witnesses being all sworn, the following proceedings are had and the following testimony is offered on behalf of the plaintiff.)

PLAINTIFF'S EX. A.

In the District Court in and for Tulsa County, Oklahoma.

WILLIAM M. FEWELL, Plaintiff,
vs.
JOHN T. REYNOLDS & HARVEY L. HOLLINSWORTH, Defendants.

Stipulation.

In the above entitled cause it is hereby stipulated and agreed by and between D. A. McDougal and Carroll and Walker, attorneys for plaintiff, and Mars & Mars, attorneys for defendants, John T. Reynolds, that this cause may be substituted to the court and tried upon the pleadings and the following statement of facts.

1. That Minnie Solander was a duly enrolled citizen of the Creek Tribe of Indians, in what was formerly the Indian Territory, and as such was entitled to an allotment of 160 A of land of the lands of said Tribe of Indians.

2. That said Minnie Solander was, on the 27 day of Aug. 1898, duly and legally married to George A. Solander, and that
38 there was born to them as the sole and only issue of said marriage, one child a daughter, named Hettie L. Solander.

3. That on the 8th day of October, 1899, said Minnie Solander died intestate, in the Western District of the Indian Territory, and left surviving her, her said daughter, Hettie L. Solander, and her said husband, George A. Solander, and one sister, Phœbe B. Trusler.

4. That on the 3rd day of December, 1901, the heirs of said Minnie Solander filed on the south west quarter of the southeast quarter and lots three (3) and four (4) as her surplus, and on the southeast quarter of the southeast quarter as her homestead, all in section two (2) township seventeen (17) north, range thirteen (13) east, in what was formerly the Creek Nation and the Indian Territory and now State of Oklahoma, and that on the 3rd day of December, 1901, the Dawes Commission issued to said heirs of said Minnie Solander, allotment certificates for said above described lands.

5. That on the 5th day of May, 1903, after the death of said Minnie Solander, allotment deeds were duly and regularly issued and delivered by the Principal Chief of the Creek Nation, to the heirs of said Minnie Solander, conveying to them the lands above described.

6. That said Hettie L. Solander, was born on the 22nd day of February, 1899, and was duly and regularly enrolled as a citizen of the Creek Tribe of Indians, and as such was entitled to an allotment of 160 acres of the lands of said tribe.

7. That on the 17th day of November, 1899, Hettie L. Solander, the only child of Minnie Solander, and George A. Solander, died intestate, unmarried and without issue, and left surviving her, her

father, the said George A. Solander, and her aunt (her mother's sister) the said Phœbe Trusler, her nearest relative of Indian Blood.

8. That on the 4th day of December, 1901, the heirs of said Hettie L. Solander selected and filed on as her allotment of
39 the lands of the Creek Tribe of Indians the south east quarter of Section 30 township 19 north, range 13 east, in what was formerly the Creek Nation, in the Indian Territory, and that on said date the Commission to the Five Civilized Tribes, and what is known as the Dawes Commission issued allotment certificates to the heirs of the said Hettie L. Solander, conveying the said lands to *the*,

9. That on the 5th day of May, 1903, after the death of said Hettie L. Solander, allotment deeds were duly and regularly issued and delivered by the Principal Chief of the Creek Nation, to the heirs of the said Hettie L. Solander, conveying to them the lands above described.

10. That said George A. Solander, the husband of Minnie Solander and the father of Hettie L. Solander, was not an enrolled citizen of the Creek Tribe of Indians, but lived and resided in the Creek Nation, and the Indian Territory, on the date of the deaths of said Minnie Solander, and Hettie Solander, and had lived and resided in the Creek Nation, for a number of years before the deaths of his said wife and child, but did not live with them or support them at the time of their deaths and for several months prior thereto.

11. That George A. Solander is a native born citizen of the United States, not of Indian Blood, and was such citizen at the death of his wife, Minnie Solander, and of his daughter, Hettie L. Solander.

12. That said Phœbe B. Trusley, the sister of said Minnie Solander and the aunt of said Hettie L. Solander, was a duly enrolled citizen of the Creek Nation, and was enrolled as a mixed blood and lived and resided in the Creek Nation, and the Indian Territory, on the date of the deaths of said Minnie and Hettie L. Solander, and is their nearest relative by Indian Blood.

13. That said defendants, John T. Reynolds and Harvey L. Hillingsworth are in possession of the following described portions of said lands to-wit:

The north half of the north west quarter of section two
40 (2) and the south west quarter of section thirty (30) all in township nineteen (19) range thirteen (13) east, same being the lands in controversy in the above cause.

14. That the lease alleged in the complaint to have been made by George A. Solander to William Fewell was in fact executed as alleged in said complaint.

15. It is further agreed that the said George A. Solander, did not make the selections of the allotments herein mentioned.

16. It is also agreed that prior to, and on the 7th day of September, 1905, defendant Reynolds held possession of the aforesaid lands under and by virtue of a five year agricultural lease, and bond for deed and warranty deed all made by Phœbe B. Trusler to said Reynolds, all of which had been duly recorded as provided for by law.

17. That the Ark. Law of Descent and Distribution on Dec. 4th and 5th, 1901, and May 5th, 1903, is set out in Chapter 49 of Mansfield's Digest of the laws of Arkansas.

That the only statutes in relation to descent and distribution in the Creek Nation prior to, at and on all the dates above mentioned are as follows:

"SEC. 6. Be it further enacted, that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons; and in all cases where there are no children, the nearest relation shall inherit the property. Laws of Muscogee Nation 1880 p. 132.

"SEC. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one half of the estate, if there are no other heirs and an heirs' part, if their should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner. Laws of Muscogee Nation, 1880, p. 60.

SEC. 1. All non citizens, not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have a right to live in this nation and enjoy all the privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands. Laws of the Muscogee Nation, 1890 p. 60."

18. That in the event this cause should be decided in
41 favor of the plaintiff that the defendant will pay to plaintiff whatever sum of — as and by way of rent for the above described premises since he has been in possession of same, which may be hereafter agreed upon or shown to be reasonable and right.

19. That this cause may be submitted to the court for decision and determination upon oral or written argument, or both, and without the intervention of a jury and nothing herein shall be construed to affect the rights of either party to appeal their case.

Made by the counsel for parties in this case on December 11th, 1908.

McDOUGAL, WALKER & CARROLL,
Attorneys for Plaintiff.

MARS & MARS,
By J. J. M.,
Attorneys for Defendant John T. Reynolds.

Indorsed as follows: To be filed as date of reference 16 Dec. 21st Judicial Dist., Tulsa Co. Okla. Filed in Open Court May 25, 1909. W. W. Stuckey Clerk District Court.

B. S. PETTIS, being called as a witness for the plaintiff, testified as follows:

Direct examination.

By Mr. MARTIN:

Q. State your name to the Court, Mr. Pettis?
A. B. S. Pettis.
Q. Where do you live?

A. Tulsa, Oklahoma.
Q. How long have you resided here?
A. About five years.
Q. What is your occupation?
A. I am in the real estate business.
Q. Are you acquainted with the land involved in this action, the south west quarter of the southwest quarter of Section two?
A. Yes sir.
Q. Township 19 north, range 13 east, and also the south-
42 east quarter of Section 3, township 19 north, range 13 east?
A. Yes sir.
Q. How long have you been acquainted with this land, Mr. Pettis?
A. I suppose about three years.
Q. Do you know their reasonable rental value at this time?
A. Well, I believe I do.
Q. Do you know what has been their reasonable rental value since September, 1906?
A. Yes sir.
Q. What has been the reasonable rental value of these lands from—I mean per annum, from September 1906, until the present time?
A. Do you mean the total for the three years?
Q. Well, get at it in any way, Mr. Pettis?
A. Well it is worth a hundred and seventy-five dollars for the first year; lands have increased in value right along, and about three hundred dollars for the succeeding years, each. They have greatly increased the rental value for each year.
Q. The aggregate rental value during that time, then would aggregate about Five Hundred dollars?
A. Yes sir, a little more than that, Five hundred and seventy-five or Six hundred dollars.

Cross-examination.

By Mr. LAWRENCE:

Q. How far is that land situated from Tulsa?
A. About four miles.
Q. Farm land, is it?
A. Yes sir.
Q. How much of it is in cultivation?
A. I think there is about eighty or ninety acres; or near to that.
Q. That is your best judgment?
A. Yes sir.
Q. How much would you put it per acre, the last two years?
43 A. I would put it on an average of about one dollar and seventy-five cents, or along there.
Q. For the whole amount, one hundred and sixty acres?
A. Yes sir.
Q. For the whole amount of land?

A. Yes sir.
Q. About a dollar and seventy-five cents?
A. Yes sir.
Q. You have no interest in this matter, have you?
A. No sir.
Q. You are not in any way interested in the decision of the case?
A. Yes sir.
Q. That is what I want to know?
A. Yes sir, I am interested in the decision of the case.
Q. In this land?
A. Yes sir.
Q. In what way?
A. In the profits in this matter.
Q. You have a share of the profits to be recovered in this suit then?
A. Yes sir.
Q. You understand that his object is to get the title in this land involved in this litigation?
A. Yes sir.
Q. What share do you get?
A. Just to make a divide.
Q. That is one-half of whatever you make?
A. Yes sir.

WILLIAM FEWELL, being called as a witness for the plaintiff, testified as follows:

Direct examination.

By Mr. MARTIN:

Q. You are the plaintiff in this case, are you?
44 A. Yes sir.
Q. Where do you reside?
A. Tulsa.
Q. What is your occupation?
A. Well, sir, I was born and raised on a farm, and used to handle stock, but for the last three years I have had a sick daughter and have done nothing but nurse, and have spent most of my time in the west until she died, since that time I have been taking care of my wife, and she is now in Kansas City taking treatment, I was born and brought up on a farm, but for the past three years I have done nothing but *nordse*.
Q. You were brought up on a farm you say?
A. Yes sir.
Q. Do you know the rental value of farm lands, in this neighborhood?
A. Yes sir, I have several farms around here.
Q. How long have you lived here, Mr. Fewell?
A. Six years.
Q. During that time you have been interested in farm lands, have you?
A. All my life.

Q. Are you acquainted with the land in controversy in this case?
A. Yes sir.
Q. Do you know the reasonable rental value of these lands, since the time you took your lease on them?
A. Yes sir.
—. ——.
A. Well, about a hundred and fifty or a hundred and seventy-five dollars would be a reasonable amount, possibly in 1905 and '6 and along there, I was in possession of the land in 1904, and rented it to a man who was on there when I took the lease from Mr. Solander, I took a five year lease from him, but the man that was on there then become dis-contented and would not complete his contract with me,——

45 Mr. LAWRENCE: We will object to that, as not being responsive.
The COURT: The objection will be sustained.
Mr. MARTIN: Plaintiff excepts.

Q. I don't want anything like that Mr. Fewell, I want to know the reasonable rental value of the lands since that time?
A. Since that time.
Q. Yes sir?
A. Well, two hundred dollars per year, would be a reasonable price.
Q. You say, Mr. Fewell, that you are entitled to this land, did you take your lease from Solander?
A. Yes sir.

Mr. LAWRENCE: We want to object to that.
Mr. MARTIN: I will withdraw the question.

Cross-examination.

By Mr. LAWRENCE:

Q. Do you think this land would be worth two hundred dollars every year?
A. Yes sir.
Q. For what years—how many years?
A. Well, for a while the bottom wasn't worth as much as it is now, but along in the years 1905-'6-'7 and '8, I think it would be worth more; now for instance this year, the land would bring a little better rent than at any time before possibly, and last year the rents were higher too, I believe it would rent for two hundred dollars now, maybe two hundred and twenty or fifty, I don't know just exactly, in that neighborhood; of course it depends a good deal on how much of the land is in cultivation, as to how it rents.
Q. Well, how much of this is in cultivation, do you know?
A. I don't really know just how much; parties have told me there was about ninety acres.

46 Q. You haven't been over the land, then?
A. Yes sir.
Q. Is there about eighty or ninety acres in cultivation, you think?
A. I haven't been over the land lately; Mr. Reynolds, tried to in-

sult me when I went out there to try and compromise this thing with him about two years ago——

Mr. LAWRENCE: We move that that be excluded.
The COURT: Just answer the questions Mr. Witness.

Mr. LAWRENCE:

Q. Is there as much as eighty or ninety acres?
A. That is what I have understood.
Q. You have seen the land?
A. Yes sir, I have been on it, but I didn't go all over the place.
Q. Doesn't the public road go along the side of the field?
A. Yes sir, on two side- of it.
Q. You have been over each of these roads?
A. Yes sir, I have, since Reynolds had it.
Q. How long since you past along there?
A. I haven't past along there, within about a year.

G. W. FOREMAN, being called as a witness for the plaintiff, testified as follows:

Direct examination.

By Mr. MARTIN:

Q. State your name to the court?
A. G. W. Foreman.
Q. Where do you live, Mr. Foreman?
A. Six miles southeast.
Q. In this state?
A. Yes sir.
Q. What is your occupation?
A. Farmer.
Q. What aged may are you?
47 A. Fifty-two.
Q. Have you had considerable experience as a farmer?
A. I think so, all of my life.
Q. How long have you lived in this vicinity?
A. Seven years.
Q. Are you acquainted with the rental value of farm lands in this community?
A. Yes sir.
Q. Do you know the land in controversy in this case?
A. Yes sir.
Q. Do you live near it?
A. Why, I live about four miles from it, I was living over there.
Q. Do you know its reasonable rental value, since December, 1906? To the present time?
A. Yes sir.
Q. What do you say it is?
A. Why, I think it would be worth about three dollars per acre, for what is in cultivation.
Q. You mean at present?

A. Yes sir.

Q. Well, what about its value in the previous years?

A. Well, there wasn't much of it in cultivation; what was in cultivation though would be about two dollars and a half I guess; land rented cheaper then than now.

Q. What would you say it was in—say from September, 1906, continuously, what would have been its rental value that year?

A. In 1906, that would be four or five years back.

Q. Yes sir, that would be three years back? From September 1905, or 1906.

A. Well, the land would be worth the first year, I think a dollar and a half; he of course put more of it in cultivation and that would make it worth more.

Q. From 1906 to 1907, it would have been worth about how much do you think?

48 A. Well, probably a dollar and seventy-five cents for the two years.

Q. And for 1907 and 1908?

A. About two dollars.

Q. And then the same in 1908 too?

A. Oh, now it might be worth three dollars, for this year.

Cross-examination.

By Mr. LAWRENCE:

Q. Is this a good farm?

A. Yes sir.

Q. An extra good one?

A. Some of it is extra good, and some of it fair; some of it is a little on the wet order.

Q. How much of it is what would be called, extra good land?

A. I could not say, there must be half of it, though.

Q. Eighty acres?

A. Yes sir, half of it is in cultivation.

Q. That eighty acres is worth how much?

A. There is about forty acres of extra good land.

Q. That forty acres of it, would be worth how much?

A. Three dollars, each year.

Q. What is the other worth?

A. I think there is over ninety acres in cultivation, and there would be forty acres of it, that would be worth three dollars; all worth three dollars an acre.

Q. Three dollars?

A. Yes sir.

Q. What is the best land, that is what I want to get at?

A. Why it would be hard to tell——

Q. Well, what is the best land there worth? You have seen the land and know approximately how much it would be worth per acre?

A. It would rent for four dollars, I think.

Q. That is for the best land?

49 A. Yes sir.

Q. How much of that best, is there, in your judgment, how many acres would there be?

A. There must be thirty acres, I reckon.
Q. Thirty acres?
A. Yes sir.
Q. That would leave one hundred and thirty acres?
A. Yes sir.
Q. How much is that hundred and thirty acres worth?
A. I am just counting the land in cultivation, I never figured on the rest.
Q. How much is the rest of the land worth?
A. Well, there is thirty acres, not worth anything.
Q. Thirty acres of it not worth anything?
A. No sir.
Q. Then that leaves a hundred acres to dispose of, how much is that worth, outside of that thirty?
A. Well, a part of it is in pasture.
Q. Well, how much?
A. I guess there is about twenty-five acres, I would judge it to be that much.
Q. What is that worth, as near as you can get at it, how much per acre?
A. It is timber, a part of it.
Q. Of the pasture?
A. Well, I don't know——
Q. Well, make some estimate of it, you are a farmer and living down there, and know what it is worth, or are supposed to?
A. Well, possibly it would be worth fifty cents.
Q. Would it be forth as much as forty cents?
A. I reckon you might get it, if one had to have some grass to turn out on.
Q. That is forty cents per acre?
A. Yes sir.
50 Q. Now that would leave seventy-five acres, that is twenty acres in pasture, thirty acres not worth anything, and thirty acres worth three dollars, there is eithty-five acres, now the balance of it?
A. The balance is good up-land.
Q. The balance is good up-land?
A. Yes sir.
Q. Is it cleared land, or not?
A. Yes sir, it is cleared land.
Q. In cultivation?
A. Yes sir.
Q. How much per acre?
A. Well, it is worth three dollars.
Q. That is worth three dollars per acre?
A. Yes sir.
Q. Have you any interest in this case?
A. None in the world, sir.
Q. None whatever?
A. No sir.

Q. Your name is G. W. Foreman?
A. Yes sir.

(Plaintiff rests.)

(Testimony on Behalf of the Defendant.)

JOHN REYNOLDS, being called as a witness for the defendant, testified as follows:

Direct examination.

By Mr. LAWRENCE:

Q. What is your name?
A. John Reynolds.
Q. Just John?
A. Yes sir.
Q. You afe the defendant?
51 A. Yes sir.
Q. You are in possession of the land in controversy, are you?
A. Yes sir.
Q. How long have you been in possession?
A. Four years; going on five.
Q. What time of the year did you get into possession?
A. September 20th, 1904.
Q. What date,—I didn't catch the month?
A. September.
Q. In September, 1904?
A. Yes sir.
Q. What was the condition of the land when you went there, as to being in cultivation, or not?
A. Well, there was very little of it in cultivation.
Q. How much. Just about how much?
A. About thirty-eight acres.
Q. About thirty-eight acres?
A. Yes sir, partly in cultivation, there was timber and brush on a part of that, that is deadened timber.
Q. Was there any of it in a condition of cultivation or not, if so state the number of acres?
A. Thirty-eight acres.
Q. What kind of land is it, bottom or up-land?
A. The bottom land, there is about eighteen acres of it, I think.
Q. Eighteen acres of that?
A. Yes sir.
Q. What was the condition of the other?
A. There was deadened timber standing all over it.
Q. Are you acquainted with the fair, market rental value of the land at the time you went there? Do you know about what it would have — for as it was?
A. Yes sir.

Q. Well, what do you say that this land was worth per acre,
52 the thirty-eight acres?

A. At that time it would not have rented for over a dollar and a half, an acre.

Q. Well, what was the condition of the balance of the land?

A. It was all timber.

Q. Was it enclosed?

A. No, not entirely.

Q. Well, was there any of it inclosed outside of this thirty-eight acres?

A. It had a fence on two sides.

Q. Well what do you say of it, was it of any rental value whatever, if so state how much?

A. Yes sir, some of the pasture.

Q. Well, you used it as a pasture, did you not?

A. Yes sir.

Q. What was it worth per acre, the balance of it?

A. Why, a half dollar.

Q. That is all the balance of the land?

A. Yes sir, about forty acres of pasture, of what was inclosed as pasture.

Q. About forty?

A. Yes sir, forty acres.

Q. Worth how much, forty cents?

A. A half dollar.

Q. Fifty cents?

A. Yes sir.

Q. That is how much, forty acres?

A. Yes sir.

Q. Well, what is the remainder of it worth, about?

A. It has no value at all.

Q. No rental value?

A. No sir.

Q. Now, what was it the next year, 1904, what would it be
53 worth, what did you have in the cleared land, what kind of crops?

A. Corn.

Q. Well, now for 1905?

A. Well, I had no crop out in 1904.

Q. You didn't;—did you have any out at all?

A. No sir, none at all.

Q. You never used any of the land that year?

A. No sir.

Mr. MARTIN: We will object to that as being leading.

Mr. LAWRENCE:

Q. Did you put in any crops the year you went there, 1904?

A. No sir, none at all.

The COURT: I would suggest that you confine yourself to the rental value of the place, the reasonable rental value of the place.

Mr. LAWRENCE:

Q. For the year of 1904?

A. No sir, from the time I went there, I didn't have time to put in any crop.

Q. What was the rental value of it for 1904, while you occupied the land, during that year?

A. Why, there was no time to do anything with it.

Q. Was it of any rental value?

A. Not that year, of no rental value that year.

Q. What was there on the land at that time, any house?

A. Yes sir.

Q. Any improvements?

A. There was an old log-house.

Q. Now, in 1905, did you use the land?

Mr. MARTIN: We are going to object, as this witness has not qualified on the question of rental values.

Mr. LAWRENCE:

Q. Now, what is the rental value for the time you have oc-
54 cupied the *that* land, the rental value?

A. A dollar and a half.

Q. Do you know it?

A. Yes sir, I know it.

Q. What was it worth in 1905?

A. A dollar and a half per acre, that is the cultivated land was worth a dollar and a half per acre.

Q. Can you put it all together, and say what it was worth, what was the whole lot worth in 1905, that is the rental value?

A. I can figure it.

Q. All right, I guess we will get at it quicker? *Q.* Now have you got that figured up, you should have figured it before coming here?

A. It was worth a hundred and fifty dollars for 1905.

Q. Now 1906?

A. Same for 1906, there was no more in cultivation.

Q. Well, if was worth the same for 1906?

A. Yes sir.

Q. Now for 1907, how much?

A. About a hundred and sixty dollars.

Q. A hundred and sixty dollars?

A. Yes sir.

Q. For 1908?

A. One hundred and seventy dollars.

Q. One hundred and seventy dollars for 1908?

A. Yes sir.

Q. Now for 1909, up to date, up to this time?

A. One hundred and seventy dollars.

Q. Up to this time?

A. Yes sir.

Q. Now, have you made any improvements on this land?

A. Yes sir.

Q. Well, state what you have made?

55 Mr. MARTIN: We will object, as it is incompetent, irrelevant and immaterial, and also not within the issues.
The COURT: The objection will be over-ruled.
Mr. MARTIN: We will except.

Mr. LAWRENCE:

Q. Now state the improvements?
A. Well, I have built a house on the land.
Q. What kind of a house is it?
A. A log-house.
Q. Log-house?
A. Yes sir, and a frame house;—box house.
Q. What is the log-house worth, reasonably?
A. It is worth a hundred dollars.
Q. The box-house?
A. It is worth fifty dollars.
Q. Is there any other buildings?
A. A small kitchen, worth twenty-five dollars.
Q. Was there a lean-to to one of these houses?
A. That kitchen is the lean-to.
Q. Now is there any other houses on the place; any other improvements?
A. Yes sir, I built a barn.
Q. That barn, how much?
A. Seventy-five dollars.
Q. Seventy-five dollars, is that log or frame?
A. Frame.
Q. Well, go — with the improvements?
A. I built a shed worth thirty dollars.
Q. Shed worth thirty dollars?
A. I built about 2 mile- of fence.
Q. Wire fence?
A. Yes sir.
Q. How many wires?
56 A. Three, wire.
Q. Two miles of three wire fence, the posts cost how much?
A. Five cents for the posts.
Q. How much for the fence, can you estimate the whole thing? The two miles, how much is it worth?
A. Well, it is worth about thirty dollars a mile, to build fence.
Q. Thirty dollars?
A. Yes sir.
Q. That is sixty dollars?
A. Yes sir.
Q. All right, go ahead?
A. I cut a ditch.
Q. A ditch,—how long and how deep?
A. It is a hundred and eighty rods long.
Q. All right, what is it worth?
A. The cost of the ditch was about sixty dollars.
Q. How much was it worth, reasonably?

A. It is worth sixty dollars to cut that ditch.
Q. Well, what next——

Mr. MARTIN: We will object to any evidence on the ditch, and ask that it be stricken, as it is not an improvement.
The COURT: The objection is over-ruled.
Mr. MARTIN: We will except.

Mr. LAWRENCE:

Q. Go ahead with the next?
A. I sowed twenty-five acres of Timothy and clover; the costs of that was about two and a half dollars per acre.
Q. What do you mean?
A. The cost of the seed and the labor in sowing it.
Q. How much per acre?
A. Two and a half per acre.
Q. Well, the next item?
A. Well, I have set out an orchard.
57 Q. Well, then give us the number of the trees?
A. Seventy five trees.
Q. Seventy-five apple tree-, are they?
A. Yes sir.
Q. When were they set?
A. Set in 1905, the spring of 1905.
Q. Q. What is the condition of them now?
A. The condition?
Q. Yes sir, are they bearing or not?
A. Yes sir, they are beginning to bear, and are in good condition.
Q. What are they worth?
A. Four dollars per tree.
Q. Well, what next?
A. Fifty peach trees.
Q. When were they put out?
A. Twenty of the peach grees set in 1905, they are four years old.
Q. Twenty in 1905, what are they worth?
A. They are worth three dollars a tree.
Q. Well, the other thirty, when were they put out?
A. They were set a year ago this spring?
Q. In 1908, what are they worth?
A. They are worth a dollar a tree.
Q. Well, what next?
A. Ten pear trees, four years old.
Q. Now, what condition are they in?
A. Good condition.
Q. What are they worth?

Mr. MARTIN: We are going to object to the testimony as to the condition of these fruit trees, as the witness has not qualified, as to his knowledge, of the subject.

Mr. LAWRENCE:

Q. What is your occupation?
A. Farmer.

58 Q. How long have you been farming?
A. I have farmed all my life.
Q. What experience have you had, in the handling of trees, and fruit and berries?
A. I have always had an orchard.
Q. How long have you been farming in this part of the country?
A. Five years.
Q. Five years?
A. Yes sir.
Q. Are you acquainted with the value of orchards and trees and plance, the market value of them?
A. Yes sir.
Q. Well, now you can proceed, with those pear trees?
A. They are worth three dollars, and I have ten plums.
Q. Ten plums, worth how much?
A. Two dollars a piece.
Q. How old are they?
A. Two and three years.
Q. What are they worth, two dollars?
A. Yes sir, two dollars a piece.
Q. Is there anything else in the orchard?
A. Cherries.
Q. How many?
A. Ten.
Q. How old?
A. Four years.
Q. What are they worth?
A. Four dollars a piece.
Q. What kind of Cherries are they?
A. Early Richmond and Montmorency.
Q. Well, go ahead with the berries, got any berries?
A. Some straw-berries.
Q. Got any grapes?
A. Yes sir, I have grapes.
59 Q. How many?
A. One hundred grapes.
Q. One hundred grape vines?
A. Yes sir.
Q. How old?
A. Two years old.
Q. What are they worth?
A. They are worth ten cents a piece.
Q. You have some straw-berries, you say?
A. Yes sir.
Q. How many?
A. Three acres and a half.
Q. Three and a half acres?
A. Yes sir.
Q. How old are they?
A. They have been set one year and two.
Q. One and two years,—how many of them are two years old?

A. Two acres.
Q. Two acres?
A. Yes sir.
Q. And the others are one year old?
A. An acre and a half, have been set one year.
Q. What are they worth?
A. They are worth two hundred dollars an acre.
Q. Now, have you got all the fence you had, I have two miles of fence, does this include all you have got, hog fence and the other fence included in that?
A. No sir, there is forty rods of hog wire.
Q. Forty rods of hog fence?
A. Yes sir.
Q. Is that included in that two miles?
A. No sir.
Q. What is it worth?
60 A. It is worth thirty cents a rod.
Q. Well, have you done any clearing on the farm?
A. Yes sir.
Q. Well, state what you have done, how many acres?
A. I have cleared forty acres.
Q. Forty acres of land cleared?
A. Yes sir, and I have taken the timber twenty acres that was cleared that is the deadened timber.
Q. What was it worth to clear that land?
A. Worth fifteen dollars an acre.
Q. Does that include now, all the land that you have cleared?
A. It does with the dead timber that I took of the twenty acres.
Q. Well, is there forty acres besides the twenty acres?
A. Yes sir.
Q. That twenty acres cleared, how much is that worth?
A. It is worth five dollars an acre.
Q. Now is there anything else that you want to state about improvements? Have you got a well?
A. The well was there when I moved there.
Q. Is this all now, you have got?
A. I think so.
Q. Did you put any land in cultivation besides that which you have cleared and which was in cultivation when you went there? Did you break up any of the land that wasn't cleared?
A. Nothing only some of the wet land I have mussed up.
Q. You have included everything now, have you?
A. Yes sir.
Q. Have you paid any taxes on this land?
A. Yes sir.
Q. How much?
A. Thirty-three dollars, I think.
Q. For what year?
A. The year 1908.

61 Cross-examination.

By Mr. MARTIN:

Q. Mr. Reynolds, how did you get possession of the land in the first place?

Mr. LAWRENCE: We will object to that as being immaterial, under the pleadings and the agreed statement of facts.

The COURT: The objection will be over-ruled.

Mr. LAWRENCE: We will except.

WITNESS:

A. Answer the question, Judge?

Mr. MARTIN:

Q. Yes sir?

A. I bought it from Phœbe B. Trusler.

Q. How did you get possession of it?

A. There was nothing in the way of possession, I bought the land, and went right on, there was no body in the way, no body objected.

Q. You didn't pay the tenant of Mr. Fewell's to give you possession, did you?

A. No sir, I didn't.

Q. Mr. Fewell's tenant was in possession, wasn't he, at the time?

A. He had no tenant there.

Q. Do you know Mr. Jack?

A. Mr. Jack lived there.

Q. He lived on the land at the time you took possession of it, didn't he?

A. Yes sir.

Q. You knew that Mr. Fewell had a lease on the land, at the time, did you not, from Phœbe Trusler?

A. Why, he claimed a lease, that he had paid so much money, and had refused to pay the money on the lease, and never did take the lease.

Q. Do you know anything about it yourself, or are you
62 testifying about something some body told you?

A. The lease was never paid for.

Q. How do you know?

A. I had the records to show that it wasn't.

Q. What record did you have, that contained that?

A. From the court.

Q. What court?

A. From the Recorder of Deeds' office?

Q. Don't you know that he had a lease from Phœbe Trusler, and that he was in possession at that time under her?

Mr. LAWRENCE: We will object to that.

The COURT: You are not proceeding against him under any claim Mr. Fewell had on the land against Trusler, the objection will be sustained.

Mr. MARTIN: We will except.

Q. Mr. Reynolds, now much did you say this farm was worth last year?

A. In 1908?

Q. Yes sir.

Q. It was worth a hundred and seventy dollars.

Q. One hundred and seventy dollars, rent?

A. Yes sir.

Q. Was that eight hundred dollars' worth of clearing you did, on it at that time?

A. Yes sir.

Q. How long does a strawberry crop, or garden of strawberries, how long does it last, before it has to be renewed? About how long?

A. Well, sir, it will last as long as you cultivate them and keep the plants cleaned and keep it cultivated.

Q. Is it like corn, does it grow every year, if you cultivate it?

A. Yes sir.

Q. Now you say after you planted this three acres and a
63 half of strawberries, you testified it was worth two hundred dollars an acre. Is that what you said?

A. Yes sir.

Q. Well, did you have in that amount of strawberries, worth two hundred dollars an acre over and above the other land, didn't you Mr. Reynolds?

A. Yes sir.

Q. You mean that the land the strawberries is on, is worth two hundred dollars now, after you have planted the strawberries, you mean that that part of the land occupied by the strawberries is worth two hundred dollars and acre?

A. Yes sir, the berries——

Q. Do you mean that it is worth two hundred dollars an acre more than it was before you planted the strawberries?

A. Yes sir.

Q. Well, how much did it cost you an acre to plant it?

A. Well, it didn't cost as much as it would if you buy the plants, to put out——

Q. Did you buy the plants?

A. No sir, I grew my plants.

Q. It didn't cost you to exceed five dollars, did it for the plants?

A. How much——

Q. Five dollars for all the plants you put out?

A. Well, if they didn't——

Q. Then you had to plow the land and then plant the berries?

A. Yes sir.

Q. Well, it is worth not over two dollars an acre to plant them, is it?

A. Worth two dollars an acre to plant them?

Q. How long did it take you to set out the strawberries?

A. Well, about eight men can set out about an acre in a day; it would take that many to gather the plants and prepare them.

64 Q. It would cost something like ten dollars an acre then, to set out the strawberries?

A. No sir, it would take more than that.
Q. Would it cost a hundred dollars an acre?
A. No sir.
Q. Would you say that it was worth fifty dollars an acre, to set the berries out?
A. I mean to say, that to put the plants in the ground, it would be worth fifty dollars.
Q. Well, what is it that makes this strawberry patch of so much value, after it is set out there?
A. In setting the strawberries out in a row, you have to sit down to work, and then you have to begin to cultivate them.
Q. Well, what is it that makes it so valuable?
A. It is the amount of labor it takes to grow them.
Q. The value of this land then has nothing to do with the yield, when it comes to the value of the land; that is the crop, the crop has nothing to do with the value?
A. Well, its value is when it is started.
Q. What makes it valuable, when it is started? Why is it valuable?
A. Well, it costs money to set it, and then——
Q. The value is not through the money it takes and the time to make it, that is not the reason it is valuable is it, Mr. Reynolds, but isn't its value due to what it will yield,—isn't that that makes it valuable or not?
Q. Well, it might be that.
Q. Now then this seven hundred dollars' strawberry patch, and all the rest of the farm, with the eight hundred dollars' worth of clearing on it, last year was only worth one hundred and seventy-five dollars rental?
A. Yes sir.
Q. Now how much would this strawberry patch yield last year?
A. Well, there was very little of it set last year.
65 Q. Well, that that you did have there what did it yield?
A. Last year.
Q. Yes sir, last year?
A. I couldn't give you the amount.
Q. Did it yield as much as five dollars' worth of berries?
A. Yes sir.
Q. Did it yield as much as ten dollars?
A. Yes sir.
Q. What did you do with the berries?
A. I sold them.
Q. Where did you sell them?
A. In the market.
Q. At what place?
A. Well, I sold them several different places.
Q. Well, where were they?
A. I sold to Forgey and Abecrombie.
Q. Where are they?
A. On Second street.
Q. In Tulsa?

A. Yes sir.
Q. Did you sell them the entire crop?
A. No sir, probably two-thirds of the crop.
Q. How much money *to* you get from them?
A. I don't know.
Q. What is your best judgment now, as to how much you got out of this crop?
A. I don't know what I did get.
Q. Did you get as much as fifty dollars out of it?
A. Yes sir.
Q. Well, give me as near as you can now, how much you got out of the last two or three crops, you can tell about what you got on an average?
A. Likely I sold them for three hundred dollars.
Q. Now, how much did it cost you to put these strawberries on the market?
66 A. Costs about one third.
Q. About one-third, outside of your own labor?
A. Yes sir.
Q. Is your own labor worth anything to you?
A. It certainly is.
Q. And that of your family?
A. Yes sir.
Q. What *if* it worth a year to tend this strawberry patch?
A. It is worth seventy-five dollars to attend to the strawberry patch; that is to tend and care for it through the season, an acre.
Q. It is worth four hundred dollars now, for you to tend this strawberry patch last year, to keep the weeds down out of it, so you would have some strawberries? Seventy-five dollars an acre for your labor and to cultivate and tending to the patch, and to keep the weeds down?
A. No sir, it isn't worth that much.
Q. That is what you said, Isn't it? How much is it worth now—how much did you say now, it was worth if it isn't worth seventy-five dolars an acre?
A. Just tending to it is not the hardest part of the work?
Q. Didn't you tell me, Mr. Reynolds just now, that it was worth seventy-five dollars an acre to cultivate this strawberry patch?
A. It is worth that to set the berries out and tend it, it is worth seventy-five dollars an acre.
Q. Now what is it worth to tend this strawberry patch, to tend and keep it every year an acre, how much is it worth to do that?
A. It is worth seventy-five dollars to put it on the market.
Q. Now then, you have three acres and a half?
A. Yes sir.
Q. That would be two hundred and sixty-two dollars and a half, it is worth to tend that strawberry patch last year?
A. Yes sir.
Q. It has to be cultivated every year?
A. Yes sir.

67 Q. It is worth that much every year to cultivate it?
A. Yes sir.
Q. You got three hundred dollars' worth of berries in all of the patch?
A. Yes sir.
Q. Then you would have the expense of marketing these berries, about sixty dollars each year for your own labor and trouble is that it?
A. Yes sir, I guess I would have that much.
Q. Now have you ever produced any crops from these ten cherry trees?
A. No sir.
Q. Have you ever produced any crops from these hundred grape vines?
A. No sir.
Q. Have you produced any from the ten plum trees?
A. No sir.
Q. They have been there four years have they?
A. Yes sir.
Q. And never had a crop off them yet?
A. No sir.
Q. Now have you ever produced any crop from the pear trees?
A. No sir.
Q. How much are these pear trees worth, four dollars a piece?
A. Yes sir.
Q. Why are they worth that?
A. It is worth that to set and grow them.
Q. How old do these plum trees have to be before they bear plums?
A. About five years or something like that.
Q. Do you know how long a plum tree lives after it is set out?
A. They will live from twenty-five to forty years.
Q. Plums live that long?
A. Yes sir.
Q. Did you ever raise any thing of the peach trees, have a crop from them?
A. Yes sir.
68 Q. What kind of peaches are they?
A. I have several different kinds.
Q. Albertas?
A. Yes sir.
Q. How many of them are Albertas?
A. I don't know just exactly.
Q. Did you have any crop last year?
A. We had some peaches.
Q. Did you market any of the peaches last year?
A. No sir.
Q. Did you ever market any of them?
A. No sir.
Q. You have never sold ten cents' worth of peaches out of the orchard?

A. No sir, we used all the peaches.
Q. And they are worth three dollars a tree?
A. Yes sir.
Q. And you never have produced any peaches except what you used there in your house?
A. Yes sir.
Q. They haven't born- any peaches at all?
A. Last year.
Q. That is the only time?
A. That is all that amounted to much.
Q. Now you set out seventy-five apple trees?
A. Yes sir.
Q. In 1905,—now I notice in looking over this list you say you got seventy-five apple trees, fifty peaches and ten plums and ten pear trees, and a hundred grapes, these numbers appear to be even numbers—all the trees set grew?
A. No sir.
Q. Did you ever loose any trees?
A. Yes sir.
Q. How many of these seventy-five apple trees grew?
A. Seventy-five trees is what I have.
69 Q. You set seventy-five of them and seventy-five grew?
A. No sir, I didn't say that.
Q. Well, then what did you say?
A. I said, I have seventy-five growing apple-trees.
Q. Just even seventy five?
A. Yes sir.
Q. And you have got just even fifty peach trees?
A. Yes sir.
Q. How many peach trees did you set?
A. I don't know.
Q. Just even fifty trees, and they are worth three dollars each?
A. Yes sir.
Q. Did you state you had just even ten pear trees?
A. Yes sir.
Q. Did they all grow?
A. Yes sir.
Q. Ten plum trees and they all grew?
A. Yes sir.
Q. Ten cherry trees and they all grew? All of them?
A. Probably I set more than ten cherry trees.
Q. Well, how many did you set?
A. I don't know, just exactly.
Q. You set out a hundred grapes and they all grew?
A. Yes sir, I have a hundred growing grapes.
Q. How many did you set?
A. I don't know.
Q. Do you know you have just an even hundred?
A. Yes sir.
Q. Well, the apple trees, you never said how many you set out,—how many did you set in the first place?

A. I don't know how many I set, in the first place.
Q. Now, do you know how it happens that these trees are all even numbers, that is either ten or some multiple of ten, how does
70 it happen that there is always just an even number of them? Do you know how that happens?
A. I know I have got the trees.
Q. You don't know how they all happened to be just even numbers?
A. No sir.
Q. Now, I understood you to state that you moved some old dead timber?
A. Yes sir.
Q. Now you say you have got twenty-five acres of Timothy grass, have you, and clover?
A. Yes sir.

(Recess until one-thirty P. M.)

Afternoon Session, 1.30 P. M.

(Cross-examination of Mr. REYNOLDS cont'd.)

Mr. MARTIN:

Q. When, Mr. Reynolds did you build this log-house?
A. In 1904.
Q. When?
A. In 1904, in the fall of 1904.
Q. When did you build the box house?
A. I built one small box house, in 1904.
Q. When did you build the next buildings on there?
A. I put some of it on there in 1908.
Q. That is when you built the kitchen?
A. Yes sir, when I built the box house.
Q. When did you put this kitchen on?
A. In 1904.
Q. When did you build the stable?
A. In 1909.
Q. When did you build this shed?
A. In 1909.
Q. When did you build this two miles of fence?
71 A. In 1905.
Q. What time of the year?
A. In the spring of the year.
Q. Was it new wire?
A. Part of it was new wire.
Q. How much of it was new wire?
A. About twenty-five dollars' worth.
Q. How much fence was there on there before you went on the place?
A. About a mile or three quarters.
Q. What was included in that fence, pasture?
A. Yes sir, pasture.

Q. There was forty acres inclosed, in what kind of a fence?
A. Three wire fence.
Q. It that there yet?
A. Yes sir.
Q. Now referring to this ditch, Mr. Reynolds, what did you dig that ditch for?
A. To drain the land?
Q. Did it do it?
A. To a certain extent, it did.
Q. That was that part of the land that you do not use, isn't it?
A. Yes sir, partly.
Q. Did it drain anything else?
A. It drains part of the farm lands.
Q. That ditch has not been sufficient to carry off all the water, has it?
A. It has so far, off the farm lands.
Q. When did you plant this twenty-five acres of grass?
A. In 1908.
Q. When did you dig the ditch?
A. In the spring of 1908.
Q. In 1908?
A. Yes sir.
Q. What kind of apple-trees are those?

—. ——.

72 Q. That is what variety of apples?
A. Ben Davis, Missouri Pippin, Maiden-blush, and Johnathan.
Q. Did you say they had been bearing fruit?
A. Yes sir.
Q. When?
A. Last year there was a few apples.
Q. How many?
A. Oh, just a few.
Q. Enough to market?
A. No sir.
Q. When did you plant these peach trees?
A. In 1908, in the spring of 1908.
Q. And the ten pear trees?
A. In 1904,—1905, in the spring 1905.
Q. When did you set the twenty peach trees?
A. In the spring of 1905.
Q. And the ten plum trees? When did you put those out?
A. Two and three years ago.
Q. Well, that was in 1907 and 1906?
A. Yes sir.
Q. The Cherry trees?
A. In 1905, in the spring of 1905.
Q. And the grapes?
A. In the spring of 1905.
Q. And the strawberries?
A. In the spring of 1906, and 1907.

Q. In 1906 and 1907? When did you clear the forty acres of land?

A. I cleared some of it 1904. Cleared twelve acres, and then I took the dead trees off of twenty acres.

Q. In what year, 1904?

A. In 1904, yes sir.

Q. When did you clear the balance of twenty-eight acres?

A. I cleared part of it in 1907 and 1908.

73 Q. Now do I understand you, that after clearing and putting in cultivation all of this land, that you cleared in 1907 and 1908, only added to the rental value of the farm together with the orchard, and all the trees that you have planted, only added about ten dollars a year, is that correct?

A. Well, there was a part of it that laid out, it was too wet. Too wet to do anything with and it had no rental value.

Q. It is so wet that the land cannot be cultivated?

A. I cleared it but it was too wet to cultivate at the time.

Q. The reason you put the rental value of this land, in 1907 and 1908, so low was that the land was so wet it could not be cultivated these years?

A. Yes sir, a part of it is.

Q. Well, this ditch was there then, wasn't it?

A. Yes sir.

Q. But never-the-less the land was so wet it could not be cultivated?

(No response.)

Q. Now, how much of the land was there, so wet in 1907 and 1908, that you could not cultivate it, of the land that had been put in cultivation?

A. About eight acres.

Q. About eight acres?

A. Yes sir.

Q. Now, did you cut the logs off the land, that you built this log-house out of?

A. Partly.

Q. What sized house is it?

A. Sixteen by eighteen.

Q. One or two rooms?

A. One room.

Q. One room,—now in the construction of that house, what material did you use except what you took off the place?

A. I used shingles to roof it.

74 Q. What was the bill, do you know?

A. Thd bill was about sixty-five dollars.

Q. You say that was since 1904?

A. Yes sir.

Q. The roof is in good condition yet, is it?

A. Yes sir.

Q. It will turn water?

A. Yes sir.

Q. Now do you mean, that the entire lumber bill for the entire

improvements you put there on the place, was sixty-five dollars, or for the log-house alone?

A. For the loghouse alone.

Q. How much of these improvements have you placed on the land since the former trial of this case?

A. Since when?

Q. Since the former trial, since this case was tried before?

A. Since the case was tried?

Q. Yes sir, what improvements have you put on there since the case was tried before?

A. I put on the barn and shed.

Q. The barn and shed?

A. Yes sir.

Q. You have also put on some of the strawberries since then, haven't you?

A. Yes sir.

Q. And the ditch?

A. I put out just a few berries.

Q. Now this box house, you built that in 1908?

A. Not hardly.

Q. That is what you stated a while ago, you stated that you built it in 1908?

A. I moved that box house on there in 1908.

Q. You moved it on there, at that time?

A. Yes sir.

75 Q. When did you make this hog tight fence?

A. In 1905.

Q. There was the pasture fence and then some hog tight fence when you went there, wasn't there?

A. No sir.

Q. Was there any hog tight fence on the place when you went there?

A. No sir.

Q. None at all?

A. No sir.

Mr. LAWRENCE:

Q. Do you remember when this case was tried before, Mr. Reynolds?

A. It was tried in February, wasn't it.

Q. When?

A. In February.

Q. This year?

A. Yes sir.

Q. What have you put on the place since the trial, that you know of, and that you are sure about?

A. I put on the barn and shed, since the trial.

Q. What did you have there before that,—did you have any barn or any shelters there at all?

A. No sir, there was no place to keep stock at all.

Q. Sir?

A. There was no place to keep stock.
Q. Did you have any stock?
A. Yes sir.
Q. You put on the shed and barn, I understand?
A. Yes sir, it is a strawberry shed, and that barn.
Q. That is a strawberry shed?
A. Yes sir.
Q. Now this ditch, in what respect does that improve the land, if any?
A. It is a great deal, as I understand it; I think the court will understand it.
76 Q. Well, describe it to the court, so the court will understand it, how long and how deep is it?
A. That ditch is a hundred and eighty rods long.
Q. How deep?
A. Why, it will average about eighteen inches deep, and about four feet wide.
Q. In what respect is it an improvement to the land, if any?
A. Well, it carries off the water, from a part of the farm land, and helps to keep it dry.
Q. Now in respect to the two years of 1906 and 1907, what kind of years were they, as being dry or wet?
A. Well, this ditch wasn't built at that time, it was wet those years.
Q. How was it after the ditch was built?
A. How was the water?
Q. Yes sir?
A. Well, the land was all water.
Q. Was it fit for cultivation or not?
A. No sir, it wasn't.
Q. Well, after the ditch was built, how was it?
A. Well, I put Timothy on part of it.
Q. That is where that timothy crop is?
A. Yes sir, there is a good stand of timothy and clover.
Q. What kind of a stand?
A. A good stand.

Mr. HENDERSON:

Q. How long did it take to make this ditch?
A. I guess it took something like three or four days.
Q. You did it with a plow, didn't you?
A. No sir, we had a scraper.
Q. You have to constantly keep cleaning the dirt out of it, don't you, when there comes a heavy rain, it washes in and fills it up, doesn't it?
77 A. No sir.
Q. Does it keep open?
A. Yes sir.
Q. That ditch was necessary for your own benefit, wasn't it, in the production of a crop?
A. Sir?

Q. That was necessary for your own benefit?
A. Well, I supposed I had the place, of course at the time I put it there, I thought I had a right to put it there.
Q. You put it there to put the ground in shape so you could produce some crops on it? Didn't you?
A. Yes sir.

Mr. MATHISON, being called as a witness for the defendant, testified as follows:

Direct examination.

By Mr. LAWRENCE:

Q. Do you know this land in question, that Mr. Reynolds occupies?
A. Yes sir.
Q. How long have you been acquainted with that hundred and sixty acres?
A. Ever since it was held by the government.
Q. Phœbe Trusler, is some relation to you, is she?
A. She is my daughter.
Q. Daughter.
A. Yes sir.
Q. I didn't understand the number of years you said you knew this land?
A. I have known it about thirty years.
Q. Thirty years?
A. Yes sir, ever since it was surveyed, and long before.
Q. Well, did you know when Mr. Reynolds went into possession?
A. Yes sir.
78 Q. Well, you may describe to the court the condition it was in, at the time he went there, what improvements, if any, there were there?
A. Yes sir, I can.
Q. Well, go ahead?
A. Well, it was fenced in on two sides; I fenced in on two sides with a three wire fence, with posts every sixteen feet; there was a fence on the west side of it, that had been there a good many years; there was some farm land back between that and the river; this west fence wasn't on this land, not all of it, it was back on the quarter section, and run a little diagonally across it; I think there was something over thirty acres laid outside, and may be more, I don't know just how much, it was a diagonal fence; outside of that there was some land in cultivation on it, small bodies of land, and an old log house, and the well was on the hill, a well probably eight or ten feet deep.
Q. How much of the land was in cultication?
A. When Mr. Reynolds *when* there?
Q. Yes sir?
A. Some where along about twenty-five or thirty acres, not over thirty acres, and a part of that laid under water when ever it rained, it was right in a swamp—that is a part of it.

Q. What, in your opinion, was the rental value of that land when Mr. Reynolds went in, per acre, per year? The first year I think was 1905, he went in in September, 1905,—or 1904, rather? Then for the year of 1905, and up to the present time, that is 1905, '6, '7, '8, and '9?

A. I don't know whether I could make an estimate of that or not; I never paid much attention to it, I lived out there pretty close, for about ten years.

Q. Well, you have had some experience in that business haven't you?

A. Yes sir.

Q. What was your occupation, when you lived down there?

A. I didn't live on it at all.

79 Q. Well, you lived in that section?

A. Yes sir, down south of there.

Q. You are a farmer?

A. Yes sir.

Q. You know what the rental value of land has been in that locality, during the years I have mentioned?

A. When?

Q. Since 1905?

A. I don't know whether I could make an estimate of that or nor, I have always rented for two and a half to three dollars an acre, but this land I don't know hardly how to make the estimate; I lived there for two years, and had more land than I could hold, and only had the land for about two years.

Mr. MARTIN: We will object and move to strike it out?

The COURT: The motion will be sustained.

Mr. LAWRENCE: We will except.

Q. In your judgment—What is your opinion as to what it would be worth these years, taking the improvements that have been made on it, what would it be worth each year, 1905, '6, '7, and '8, and up to date, that is up until May 1909?

A. I would not give over a dollar and a half an acre, if I was going to rent it.

Q. What is your opinion as to its value, would it be worth that, or not?

A. It would not be worth that to me.

Q. How much could it be rented for, in your judgment on the market?

A. I could not say, some men would give more than others.

Q. What would be the reasonable rental value of it?

Mr. MARTIN: We will object, as the witness has said he does not know.

Mr. LAWRENCE:

Q. What would it rent for?

—. ——.

80 Q. Give us some estimate, or your opinion as to what it would be reasonably worth?

A. Well, I think a dollar and a half would be a good price for it.

Q. You have seen this land lately haven't you?

A. No sir, I haven't been out there in two years.

Cross-examination.

By Mr. MARTIN:

Q. Mr. Mathison, did you know this land before Mr. Reynolds went on it?

A. Yes sir.

Q. Was there any hog tight fence on it, when he went there?

A. Yes sir.

Q. How much of it was fenced in hog tight?

A. I run a fence across it, to keep the hogs and other stock off of the cultivated land, when I had it.

Q. It run clear across that quarter section of land?

A. Yes sir.

Q. Now then, Mr. Mathison, if there had been seven hundred dollars' worth of clearing done upon the property, and seven or eight hundred dollars' worth of work in putting in strawberries, and something like four or five hundred dollars' worth of trees, and about fifty acres put in cultivation, would that amount be the reasonable rental value of it?

A. I think it would.

Q. You haven't seen anything of the kind there since it was done?

A. No sir, I didn't see that.

Q. When was the last time you saw this land, Mr. Mathison?

A. Well, my best recollection is, it is three years and a half, since I was on the place.

Q. The last three years, you don't know what state of improvement it has been put in?

A. No sir.

81 Q. And of course then you could not state what its rental value is?

A. No sir, I don't know anything about that.

Q. Do you know who owned the improvements on the place, when Mr. Reynolds went there?

A. Phœbe Trusler owned them.

Q. Didn't she sell it to Mr. Fewell?

A. No sir, I bought the land one time form my daughter myself, and I think I sold it and the improvements on it back to her, I put about two hundred dollars' worth of fencing on it, when I had it.

Q. You didn't sell anything to Mr. Fewell?

A. No sir.

Q. You didn't get paid for it?

A. No sir.

Mr. LAWRENCE:

Q. You say these improvements were all on the land of Phœbe Trusler?

A. I put some of the fencing on it myself.
Q. She got the benefit of it, didn't she?
A. Yes sir.
Q. How much of it was there?
A. I spent about two hundred dollars, for fencing and posts, something like that.
Q. Did I understand you to say there was some hog-tight fence, there when Mr. Reynolds went there?
A. Yes sir.
Q. On what part was it?
A. I had it fenced for a pasture, and I put this hog fence on it, when I had it in my possession; I had some land cleared out in the pasture, that is I cleared it out in the pasture, and then ran a fence to keep the stock out of the crop, it was a hog tight fence of seven wires; it went just west of where that well is, at the south edge of it.
82 Q. Was that on the land in controversy, the Reynolds land?
A. Which?
Q. I want to know if the hog fence was on the land in controversy or Phœbe Trusler?
A. It wasn't Phœbe's land.
Q. Hettie Solander, I mean?
A. It was Hettie's allotment, where I have reference to.

Mr. MARTIN:

Q. I understood you to say, that a portion of the land lay under water and good deal?
A. Yes sir, it did when I knew it.
Q. That swampy portion of it was first put in cultivation before the rest of it was?
A. Yes sir, that is the land that was in cultivation on the west side of the slough that run through it; when I had charge of it, there was nothing on the south side and the east side that was in cultivation there is a slough ran diagonally almost across the quarter, there was probably twenty or twenty-five acres on the west side of that slough and a part of this land, I have seen it covered, and some of the land back south, I have seen water all over it.
Q. The whole of it is rather low and will overflow?
A. Yes sir, and there is a big slough there, goes down through the land.
Q. So far as you know, all of this cultivated land is subject to over-flow?
A. Yes sir, the water gets pretty well all over it when it rains hard.
Q. That is that in cultivation?
A. Yes sir.
Q. It is all pretty well subject to over-flow?
A. Yes sir, it is all right close to the slough.

83 Mr. DONALD being called as a witness for the defendant testified as follows:

Direct examination.

By Mr. LAWRENCE:

Q. How long have you known this land in question, Mr. Donald?
A. Since November, 1904.
Q. Where do you live with reference to this land?
A. At the present time, I live about a mile and a half from the land.
Q. Have you been living close to it since, 1904?
A. Yes sir, I lived on the farm adjoining in 1905, '6, and '7.
Q. In 1905, '6, and '7 you lived on the farm adjoining?
A. Yes sir.
Q. What is your occupation?
A. Farmer.
Q. Do you know the condition of the farm in 1904?
A. No, sir, I didn't see it until in November, 1904, I knew the condition of it in 1905.
Q. Well, do you know the condition of it now?
A. Yes sir.
Q. Who has been occupying that land since 1904?
A. John T. Reynolds, has been occupying the farm.
Q. Can you state about the amount that was in cultivation, in 1904, when you first knew it?
A. Well, I judge there was about fifty acres including the eighteen or twenty acres covered over with heavy dead timber, when I first knew it.
Q. That — how many acres in dead timber?
A. I judge about eighteen acres, of heavy dead-ned timber, on it.
Q. Without that deadened timber, there would be about thirty acres or a little more; what kind of land was it?
A. Well, it runs down into the Arkansas bottom, and was pretty wet land, the most of it.

84 Q. What kind of a season was it in 1905 and 1906 and '7?
A. Well, 1905 and '6 was pretty wet seasons, and the early part of 1907 was pretty wet, but in the summer of 1907 we had pretty dry weather in this country.

Mr. MARTIN: We will object to that, as it does not prove the rental value of the land.

Mr. LAWRENCE:

Q. Now, do you know what the rental value of land was in that locality, and this land in particular?
A. Yes sir.
Q. What would you say this farm was worth in 1905 by the acre or in mass?
A. Well, that farm, it would rent in that locality for about a hundred and fifty dollars.
Q. For 1905?
A. Yes sir.

Q. In 1906.

A. There was no material change in the farms, they all rented about the same in 1906.

Q. Well, 1907?

A. There was some more land put in cultivation?

Q. What was the rental value of it then?

A. In that locality for the year of 1907, I judge about a hundred and sixty or seventy-five dollars,—One hundred and seventy five dollars.

Q. One hundred and seventy-five dollars?

A. Yes sir.

Q. In 1908 what?

A. Well, in the neighborhood of two hundred dollars;—I will say two hundred dollars.

Q. In 1909?

A. About the same.

Q. Now, we will take these improvements,—you know about the improvements of your own knowledge?

A. Yes sir.

Q. Now, you state what improvements, if any, have been put on the land about what they are worth, in a brief way? Take the house, how much is that?

A. The house,——

Mr. MARTIN: We want to made an objection to any proof of betterments that have been placed on the land since the commencement of this action, or the tenth day of November, 1905.

The COURT: I will over-rule the objection, and will try and ascertain the difference in the improvements up to that time.

Mr. MARTIN: We will except.

Mr. LAWRENCE:

Q. What is the house worth?

A. The house is worth two hundred and fifty dollars; that is the hog house and the improvements and lean-to and addition to the box house.

Q. That is houses?

A. Yes sir, the houses I would say are worth two hundred and fifty dollars.

Q. What is the barn worth?

A. About fifty dollars.

Q. The shed?

A. The shed is worth about twenty-five dollars?

Q. The shed twenty-five dollars?

A. Yes sir.

Q. Are there any other buildings besides those you have named?

A. No sir; there is some old buildings there, I don't think they amount to much, I don't know what they would be worth.

Q. Well, now take the fencing, what about the fencing?

A. Well, it is worth two hundred dollars or more; it would cost that much to put it up there.

86 Q. Does that include the fencing out-side?

A. I included in that the work of building it and material and all.

Q. Now do you know about that ditch?

A. Yes sir, I have seen that ditch.

Q. What would that inhance the value of the land, would you say?

A. I would say it would cost to put the ditch that size; I judge fifty dollars, the length of that ditch.

Q. Now, do you know about the orchard?

A. I have seen the orchard, yes sir.

Q. Have you given any special notice to it?

A. No sir, we went through there a number of times and picked some fruit, that is apples, last fall, or rather last summer.

Q. What would that complete orchard be worth?

A. It must have been put out about four years ago, or a little over four years ago, it would inhance the value of the place, I judge five hundred dollars.

Q. What is its condition?

A. The condition of the orchard is all right, the trees are all living and in good shape.

Q. Are they bearing trees?

A. Some of them,—I think they are all bearing.

Q. The peaches, how were they, did you notice them?

A. Yes sir, they were bearing some.

Q. What were they worth?

A. I included the entire orchard together.

Q. Worth five hundred dollars?

A. Yes sir.

Q. That included the apples and peaches?

A. Yes sir, and pears and grapes and all.

Q. All the fruit?

A. Yes sir.

Q. Did that include the strawberries?

A. No sir.

87 Q. Just the peaches, plums, apples and grapes and so on, what are those strawberries worth?

A. Well, if they are kept in a good condition, on the land where the strawberries are, they ought to be worth seven or eight hundred dollars.

Q. Which do you put it, seven or eight?

A. Well, I will say eight hundred dollars.

Q. How many acres are there?

A. About three or three and a half acres, I wasn't through the ground, I just looked over it, I know the appearance of it though.

Cross-examination.

By Mr. MARTIN:

Q. You say the houses are worth two hundred and fifty dollars?

A. Yes sir, the houses.

Q. Did you hear the testimony of Mr. Reynolds, as to what the houses cost, did you?

A. I didn't pay any attention to it.

Q. You think they are worth any more than they cost originally?

A. Well, yes sir.

Q. It would be worth more?

A. Yes sir, one of the houses would cost considerably more than the original cost, would cost a great deal more to put it in the same shape.

Q. Which one of the houses do you mean?

A. The box house.

Q. The one put on there in 1908?

A. Yes sir.

Q. Do you think the log house is worth any more than it was when he built it?

A. No sir.

Q. What could it be erected for?

A. You mean what it costs.

88 Q. I didn't know what it cost, what is your estimate?

A. A hundred dollars.

Q. Then if it cost less than that, it is worth more than it cost, you think?

A. No sir, I didn't say so.

Q. Now these fences, you heard what Mr. Reynolds testified as to their cost, did you?

A. I understood him to say that they cost sixty dollars to put the fence up.

Q. Yes sir, that is the material and all?

A. No sir, I didn't understand it so.

Q. He testified that it cost seventy-two dollars, and you think when it cost seventy two dollars that it ought to be worth two hundred dollars?

A. Yes sir, I think that fence is worth two hundred dollars.

Q. Did you ever build any wire fence?

A. Yes sir.

Q. How much a rod, does it cost to build a three wire fence?

A. Well, there is three or four pounds of wire,—it will take right at four pounds of wire, and it will cost three dollars and sixty cents a pound.

Q. Three sixty a hundred, you mean don't you?

A. Yes sir.

Q. And it takes three pounds to *ma*de a rod of fence?

A. No sir.

Q. How much did you say?

A. It will take right at four pounds.

Q. It takes how many pounds then, to build a rod of three wire fence?

A. It would take about twelve pounds, between twelve and sixteen pounds.

Q. Do you think it take*n* twelve pounds of barbed wire to three stran-s?

A. Yes sir.

89 Q. Do you think it would take that much?

A. Yes sir.

Q. Did you ever build a fence that took that much wire?

A. It will take more than a pound of wire for one wore, stretched.

Q. It takes about three pounds of wire for each wire, per rod?

A. Yes sir, it will take a little over that.

Q. It takes about three pounds per wire, to make a rod of three wire fence, does it not?

A. Yes sir, or more.

Q. Well, then it takes about twelve pounds of wire?

A. Yes sir, between twelve and sixteen.

Q. And this wire costs in the neighborhood of three and a half cents does it not?

A. Yes sir.

Q. One can get it all the way from two eighty-five and some times less than that, sometimes for three and a half and three twenty-five?

A. Three thirty is the lowest I ever knew of being paid.

Q. Then this wire would cost in the neighborhood of ten cents per rod?

A. Yes ten or twelve cents per rod.

Q. There is a hundred and sixty rods in a half mile out in your neighborhood is there?

A. Yes sir.

Q. Then that would be sixteen dollars for the half mile of fence? Now for four times that, or two miles of fence, it would be something like sixty-four dollars would it not?

A. Yes sir.

Q. Then these posts, they come off of the farm, didn't they?

A. Yes sir.

Q. They were cut off the land, and such posts in the market would be worth about two and a half cents each, would they not?

A. I have made posts of White oak at five cents.

Q. These are not white-oak posts are they?

A. I don't think so.

90 Q. What character of posts are they?

A. Red-oak posts, the most of them, I think there were some white-oak posts.

Q. They were all made there on the land?

A. I think so.

Q. About how long will they last out there in that wet land?

A. I helped to make a string of fences between the farm I was on, and that one in 1907, or helped to put the posts in.

Q. This wire wasn't new wire was it, altogether that was put out there?

A. Not all of it.

Q. Old wire, some of it and some of it is new wire?

A. Yes sir.

Q. Now, you estimate the cost of this wire at sixty-four dollars, you were estimating that to be new wire?

A. Yes sir.

Q. The old wire used there, is not actually worth as much as new wire is it?

A. No sir, it would not be so considered.

Q. What is the cost then of building this fence of old wire, and the posts taken off the land, and the only expense there, being the expense of cutting the posts, and whole cost would not be over fifty dollars would it, of building the two miles of fence?

A. About thirty dollars a mile to build it.

Q. Just stretching the wire, how did you put in the posts?

A. We beat in the posts.

Q. You could make about three hundred dollars in a short time, out there with a good sledge hammer?

A. No sir.

Mr. LAWRENCE: We will object to that as being a conclusion.

The COURT: The objection is sustained.

91 FRANK CLAYPOOL, being called as a witness for the defendant, testified as follows:

Direct examination.

By Mr. LAWRENCE:

Q. Where do you reside?

A. Southeast of Tulsa, six miles.

Q. What is your first name?

A. Frank.

Q. How many miles do you live from Tulsa?

A. About six miles, or six and a half.

Q. How long have you lived in that neighborhood?

A. Eleven years.

Q. Are you acquainted with the plaintiff?

A. Yes sir.

Q. And the defendant?

A. Yes sir, just when I see him, that is all, I never met him.

Q. Do you know where the defendant lives;—Mr. Reynolds?

A. Yes sir.

Q. How long have you known that place?

A. Ever since I have been in the country.

A. Eleven years?

A. Yes sir.

Q. Do you remember the year he come there?

A. Yes sir.

Q. What was the condition of that place, at the time he moved there, if you know? That is in the way of fencing, and buildings and other improvements?

A. Well, I don't know, I never paid much attention to how the fencing was, there wasn't much on it, though, I don't think.

Q. Who had been occupying it, before he came there?

A. A fellow by the name of Jack.

Q. Do you know of any body else ever occupying the place before Jack?

A. Yes sir, I lived on it two years, myself.

Q. Before or after Jack?

92 A. Before.

Q. From whom did you get the place?

A. I didn't rent it from any one, it was outside.

Q. Are you a non-citizen?

A. Yes sir.

Q. Who put on these improvements, do you know?

A. What improvements?

Q. Before Reynolds come there?

A. No sir, they were on there, when I come to the country.

Q. On there when you come there.

A. Yes sir.

Q. Did you get a permit from any body?

A. No sir.

Q. What improvements were there, when you went there?

A. Wasn't any there except what I put there, only this old log-house,—that old log-house, I think.

Q. Is that there yet?

A. Yes sir.

Q. Is that the house that Reynolds is living in or not?

A. No sir, he is using it for a barn, I think.

Q. For a barn?

A. Or a corn-crib or something of that kind.

Q. Did that add anything to the value of the premises, the log-house?

A. No sir, I don't think it would; no sir.

Q. You are acquainted with the rental value of land in that country, since Mr. Reynolds has been there?

A. Yes sir.

Q. What would this farm, in your judgment,—you are a farmer?

A. Yes sir.

Q. What in your judgment, would this farm be worth for the year of 1905? That is rental value?

A. That place to rent——

Q. Well, just take that place?

93 A. Well, that would be pretty hard to do.

Q. Well, have you got any way of estimating it, if you know what it is worth you can say, just what, in your judgment, it is worth?

A. About a dollar and a half is a good price for it.

Q. Per acre?

A. Yes sir.

Q. That for the whole thing, or just the cultivated land?

A. No sir, just what is in cultivation.

Q. What is the rest of it worth; anything outside of the cultivated land?

A. The rest of it is worth twenty-five cents an acre, I guess.

Q. A dollar and a half; now how many acres is there of the cultivated land?

A. I could not tell you; I guess there was about thirty-five acres, I would say.
Q. The balance of it is worth twenty-five cents an acre?
A. Yes sir.
Q. What would it rent for in 1906?
A. I would not give any more than in 1905.
Q. About the same?
A. Yes sir.
Q. Now, in 1907?
A. Well, it wasn't worth any more, only there was more land put in cultivation.
Q. Well, how much would that increase the value of the land?
A. I could not say, I don't know how many acres of it was put in.
Q. Well, would that advance the price any for 1907?
A. No sir, nothing more than what was in cultivation on it; I don't know how much he put in.
Q. Well, in 1908, have you noticed it for the last year?
A. No sir, I didn't; I don't know how many acres he has put in.
Q. What is that kind of land down there, what would it have been worth?
A. Well, last year it would have been worth a little more.
Q. That is for the cultivated land?
94 A. Yes sir, I suppose about two dollars per acre, or two and a half.
Q. Two and a half?
A. Yes sir, just what was in cultivation.
Q. What fencing was there on the land at the time Mr. Reynolds went there, do you know? And the condition of it?
A. Why it was tollerable bad; only with the exception of some fence Mr. Mathison put on there, possibly a year or two before Mr. Reynolds went on there.
Q. What was its condition at the time Mr. Reynolds went there, was it suitable to turn stock?
A. On the one hundred and sixty?
Q. Yes sir?
A. It would not hold anything, taking it all over.
Q. Do you know what improvements Mr. Reynolds has put on there, since he has been there?
A. Yes sir.
Q. We will take the houses, do you know about the houses put there, the improvements in the way of houses?
A. Yes sir.
Q. Have you made an estimate in your judgment, as to what they are reasonably worth?
A. No sir, I haven't.
Q. Well, can you tell, now take the house that he lives in?
A. It is a log-house of one room, possibly sixteen by eighteen.
Q. Well, is there an up-stairs to it?
A. No sir.
Q. Just one room?
A. Yes sir, one room.

Q. Is there any other room besides the one?
A. Yes sir, there is a side room, and then a box house.
Q. What are these houses worth, if you know?
A. Why, about two hundred dollars, I expect.
Q. What is that barn worth?
A. About fifty dollars.
95 Q. What are the sheds worth, or the shed?
A. About thirty dollars, I expect.
Q. Thirty dollars?
A. Yes sir.
Q. What is the fencing on the place worth, if you know, by the rod?
A. No sir, I couldn't say.
Q. You could not say?
A. No sir.
Q. Do you know anything about that ditch?
A. Nothing, only I just saw it.
Q. Have you noticed what effect it had on the land, whether it drains it or not?
A. He had a better crop last year that he had before, I don't know whether it was the ditch that caused it or not.
Q. You could not tell, that?
A. No sir.
Q. Now, can you testify as to what orchard there is?
A. Why, I could not tell anything only what I think it is worth.
Q. Well, give your judgment about it?
A. Yes sir, I can do that.
Q. Now taking everything together, except the strawberries, can you estimate what the orchard would be worth, in your judgment?
A. Two hundred dollars.
Q. That includes all of it?
A. Yes sir.
Q. What are the strawberries worth?
A. The strawberries are worth about a hundred and fifty dollars, I reckon.
Q. How much?
A. About a hundred and fifty dollars.
Q. Did you ever raise any strawberries?
A. Yes sir.
Q. How many acres has he, do you know?
96 A. No sir; I don't know; he told me he had three acres or a little better.
Q. You are estimating your figures on the basis of three acres?
A. What is that, judge?
Q. Are you putting your estimate upon the basis of three acres?
A. No sir, one acre.
Q. That is one hundred and fifty dollars per acre?
A. Yes sir.
Q. I understand you included all of the orchard and other fruits, except the strawberries?

A. Yes sir, that is the question you asked me.
Q. Well, I just wanted to be sure about it?
A. Yes sir, that is it.

Cross-examination.

By Mr. MARTIN:

Q. Mr. Claypool, you live a neighbor to Mr. Reynolds, down there?
A. Yes sir.
Q. Are you any relation of his?
A. No sir.
Q. Do you know whether the other gentlemen just on the stand were related to him or not?
A. My understanding he is, not.
Q. You are all neighbors?
A. Yes sir.
Q. How far do you live from him?
A. A mile east.
Q. You have had some experience you say, in raising strawberries?
A. Yes sir.
Q. Now, isn't it a fact, Mr. Claypool, that when a strawberry garden, is set out and cultivated, will run out; how long will those vines be prosperous, without being renewed?
A. Well, it is not necessary to set them over, if they are properly handled.
97 Q. Are there different varieties of strawberries?
A. Yes sir.
Q. What are these?
A. I couldn't tell.
Q. You don't know?
A. No sir, he told me, but I don't remember now.
Q. You have examined this garden, have you?
A. Yes sir.
Q. It is cultivated, is it, by plowing the rows, and keeping the weeds out?
A. Yes sir, and then you see strawberries will run on the ground, and sprout down, and you have to keep those out.
Q. Well, is there anything else done in the cultivation of strawberries?
A. Keeping the weeds out of them.
Q. And have to keep the runners cut out?
A. Yes sir.
Q. That is all done every year?
A. Yes sir.
Q. That is considerable labor is it?
A. Yes sir.
Q. About how much is it worth to cultivate an acre of strawberries, through the year?
A. Properly cultivated for a year?

Q. Yes sir, per year.
A. Well, one acre, I don't know whether——
Q. Yes sir, one acre?
A. Well, it is worth fifty dollars.
Q. Fifty dollars?
A. Yes sir.
Q. Is that your experience in handling strawberries?
A. Yes sir, I reckon so.
Q. It is some labor to gather and market them, is it not?
A. Yes sir.
98 Q. Did you raise any strawberries last year?
A. Yes sir.
Q. How many acres have you?
A. I have about an acre and a quarter.
Q. About the same as these?
A. I got the plants from him, yes sir.
Q. You cultivate them in the same way, and handle them in the same way, do you, generally?
A. Generally.
Q. You have about an acre?
A. I have about an acre and a quarter.
Q. Do you know how much strawberries you sold off the acre?
A. Something near it, yes sir.
Q. About what was it?
A. I sold between one hundred and fifty-five and a hundred and sixty dollars' worth.
Q. Do you know how much expense there was in marketing those berries, and gathering them?
A. I don't know as I could state, just now.
Q. Take about half of it, or something like that?
A. Oh, no.
Q. The gathering and marketing them?
A. That is gathering them and getting the boxes, and hauling them to market and taking care of them?
Q. Yes sir, about what proportion of it would it be worth to take charge of it, and do everything necessary?
A. About fifty dollars.
Q. Fifty dollars?
A. Yes sir, about that.
Q. The rest of them would be all profit?
A. Yes sir.
Q. Do you include your own labor in that expense?
A. Yes sir, in getting them to market.
99 Q. Is the strawberry culture carried on to any extent in your neighborhood?
A. No sir.
Q. Just by a few people?
A. Yes sir, not very much that I know of.
Q. Now, how long does it take to grow a strawberry vine until it bears, from the time it is set out?
A. Well, it depends on when it is planted.

Q. Well, if planted in the proper season?

A. Well, if you plant one in the fall, it will bear in the spring, and if it is planted in the spring it will not bear until the next spring.

Q. If planted in the fall, it will bear the next spring?

A. Yes sir.

Q. What percentage of expense is there in cultivating an acre of strawberries, that is preparing the ground, and setting out the plants, and cultivating it for a year; than taking charge of an acre already planted and cultivating it for a year?

A. Well, about twice.

Q. It would take about twice the expense?

A. Yes sir, if you put the ground in shape to handle the plants, and set them out.

Q. What is there to do to prepare the ground?

A. It has to be harrowed, and you have to drag it and lay it off.

Q. The first cost is probably three dollars, would it not?

A. Well, it depends on how much you harrow the ground.

Q. It would have to be gone over pretty thoroughly?

A. Yes sir.

Q. In setting out an acre of strawberries, how much labor would it take?

A. An acre of berries?

Q. Yes sir, an acre, I mean for a man, an ordinary working man?

A. Yes sir, I understand,—it would take about fifteen days.

100 Q. Fifteen days to set out an acre of strawberries?

A. Yes sir.

Q. Well, he would have time to smoke during that time?

A. Yes, but he would have to do it between meals.

Q. Then after that is done, all that is necessary to do then, is to cultivate them, keep the weeds out, and thin them out now and then, and keep them in rows?

A. Yes sir.

Q. The cost of that labor would be about what?

A. It is worth about fifty or seventy-five dollars for a year, per acre, that is to do all that is necessary.

Q. And to set them out and cultivate them?

A. Is about twice that much.

Q. The cultivation—the planting is worth what, per day?

A. A dollar and a half to a dollar seventy-five.

Q. Almost anybody can do it?

A. No sir.

Q. A child can do it as well as a grown up person?

A. No sir.

Q. What is there about it that requires any special skill?

A. Well, it is the knowing how.

Q. In knowing how to put the plants in the ground?

A. Yes sir.

Q. It would be worth about a dollar and a half per day?

A. Yes sir, but I would not want to do it for that.

Q. In your experience in setting out strawberries, what has been the cost per acre for the plants?
A. They cost about five dollars per thousand.
Q. They cost that do they?
A. Yes sir, they didn't cost me that much.
Q. Did they cost you anything?
A. They cost me a little over two dollars per thousand.
Q. How many thousand does it take to set out an acre?
101 A. Well, it depends on how thick they are.
Q. Well, I mean properly?
A. I don't know an acre is seventy yards square.
Q. How did you plant yours?
A. I planted mine three feet by two.
Q. Three feet one way and two the other?
A. Yes sir.
Q. It would take a thousand to set out an acre would it?
A. Yes sir, about four.
Q. Not over three by two?
A. Yes sir.
Q. What does it take?
A. I don't know, I never figured it up.
Q. Well, what is your best judgment?
A. Well, it would take something over nine thousand.
Q. It would?
A. Yes sir, it would take a right smart more.
Q. How many did you put on an acre?
A. I don't know.
Q. Do you know how much you paid for the whole bunch?
A. No sir.
Q. You got them from Reynolds?
A. Yes sir.
Q. You took them out of his patch?
A. Yes sir.
Q. You *have* him two dollars a thousand?
A. I gave him two hogs, for them all.
Q. Did you give him good hogs?
A. Yes, sir, pretty good shoats.

Mr. LAWRENCE:

Q. Now for an acre, how many does it take, *to* you know?
A. No sir.
102 Q. Did you set them just two feet by three feet?
A. I just guessed at it.
Q. You didn't have the land marked off?
A. No sir.
Q. Now this re-planting, how do you keep them replanted?
A. Well, they will run out runners, out there, and take root and forms a new plant, and when that plant takes root, it will send out other runners, and you have to take those new plants up and set them out in rows.
Q. You have to replant them?
A. Yes sir.

Q. When do you do that replanting?
A. Oh every summer, or along in the fall, is the proper time.

H. C. PERKINS, being called as a witness for the defendant, testified as follows:

Direct examination.

By Mr. LAWRENCE:

Q. Your name is H. G. Perkins, isn't it?
A. Yes sir.
Q. Where do you reside?
A. I live down there close to Mr. Reynolds.
Q. How long have you lived there?
A. Three years and a little better.
Q. How near to him? You say close, now how near?
A. Oh, I live fifty or sixty rods something like that, just south of him and across the road, the section-line.
Q. What is your occupation?
A. Farmer.
Q. How long have you been farming?
A. All my life.
Q. Have you ever had any experience in growing fruits?
A. No sir.
103 Q. Orchards?
A. No sir.
Q. Have you had any experience in improving farms?
A. Some little, yes sir.
Q. Have you been over this place in question?
A. Yes sir, I have been over it a good many times.
Q. Are you acquainted with its situation or farming conditions?
A. Pretty well, yes sir.
Q. When is the first time you had any knowledge of it?
A. In 1906.
Q. Do you know what land rents were, down there in that neighborhood? At that time?
A. Well, no sir—well I will say all the way from two to two and a half an acre.
Q. What would be the highest price for farm land down there?
A. About three dollars, I think, for the best land.
Q. What kind of land would that be called?
A. It would be called first class land.
Q. Bottom land or up land?
A. Bottom land.
Q. Is there any of this land in the bottom or not?
A. Of Mr. Reynolds?.
Q. Yes sir, this land *that* Mr. Reynolds' is it bottom land?
A. Part of it.
Q. What bottom?
A. River bottom.
Q. How is it as to being wet or dry, and subject to over-flow?
A. Well, part of it, is awfully wet land, sort-a of a swamp.

Q. Is there any land on that farm, worth three dollars an acre?
A. There might be a little on the east side, that would be worth that.
Q. About how many acres of it, would you say?
A. Oh, probably twenty acres.
Q. How much?
A. Twenty acres, or some-thing like that, I would not be sure.
104 Q. Twenty acres at three dollars an acre, do you mean that for all the time you have been there?
A. Well, something like that.
Q. Well, what is the next best worth, and how many acres?
A. Well, there is something like twenty acres, may be twenty-two over across the swamp, a dollar and a half to two dollars, would be a good price for it.
Q. Twenty acres at two dollars?
A. Yes sir.
Q. Now is there any more cultivatible land near that besides this twenty acres?
A. Well, there is some fifty or sixty acres possibly, ought to be in there, some of it is wet land and some of it is not.
Q. What is that worth, the last you mentioned, the fifty or sixty acres?
A. It would probably be worth two and a half an acre, take it all around.
Q. What do you estimate it at, how many acres, fifty or sixty?
A. About sixty acres, I think there is something near that.
Q. Outside of this twenty?
A. No sir, about sixty acres in all.
Q. All together?
A. Yes sir, I think there is something like that.
Q. What is the average rental, in your judgment?
A. Well, part of it would be two and a half or two dollars, and some of it three dollars, that would be a good price for it.
Q. Now, we have got twenty acres of three dollars, and twenty of two dollar land, that is forty acres, now there is twenty more acres?
A. Part of that I said was good land, and part of it was wet land.
Q. Now we have got twenty acres you put at three dollars, and twenty acres at two dollars, and you say there is sixty acres, that would leave twenty acres, now what is that twenty acres worth?
A. Two dollars and a half.
105 Q. Two dollars and a half?
A. Yes sir.
Q. Now for what years did you include this?
A. 1906, '7, and '8.
Q. What are you putting it at for this year?
A. The same, it would be about the same, I suppose.
Q. Have you looked over the improvements put on the land, that you know of.
A. Yes sir, I have seen the improvements.

Q. Did you see the improvements when you come there, notice them?

A. Yes sir.

Q. Now, can you make a statement, as to what in your opinion, they are reasonably worth?

A. Well, it would be worth two hundred dollars, or two hundred and twenty-five dollars, that is the house would.

Q. The houses, what are they worth?

A. I think they would cost two hundred and twenty-five dollars.

Q. For all the houses?

A. Yes sir.

Q. Now, how much is that barn worth?

A. Oh, it would be worth fifty or sixty dollars.

Q. Well, which would you say, fifty or sixty?

A. Sixty.

Q. Well, the shed, is there a shed?

A. Yes sir, it is worth twenty dollars.

Q. Sir?

A. I guess it would be worth twenty dollars.

Q. Have you observed the fencing there?

A. I have seen the fencing, yes sir.

Q. What would it be worth, in your opinion, by the rod? Do you know the number of rods?

A. I think that fencing s-ould be worth a couple of hundred dollars, or a hundred and seventy-five.

106 Q. For the fencing?

A. Yes sir.

Q. Which do you put it at?

A. A hundred and seventy-five dollars.

Q. Now this orchard, and the strawberries, did you notice them?

A. Yes sir, I have seen them there, I walked through them a time or two.

Q. What is that orchard worth?

A. Well, I hardly know, I know what it would be worth to me.

Q. It would inhance the value of the land, how much, by reason of that orchard?

A. Well, it would be worth four hundred dollars.

Q. Do you mean the whole orchard?

A. Yes sir.

Q. Does that include the strawberries?

A. No sir.

Q. What are the strawberries worth?

A. Well, I don't know, what they would be worth, I never had any.

Q. Have you had any experience with strawberries?

A. No sir, I am just setting out a patch now, I am getting some experience.

Q. From your investigation now, what would it be reasonably worth?

A. It would be worth a hundred and fifty dollars, I expect.

Mr. MARTIN: We object to that, and move to strike it out.

The COURT: The objection and motion will be sustained.
Mr. LAWRENCE: We will except.

Cross-examination.

By Mr. MARTIN:

Q. Are you related to Mr. Reynolds?
A. No sir.
Q. Just live in his neighborhood?
107 A. Yes sir.
Q. Now there is about two miles of fence on the farm that Mr. Reynolds built, is there not?

Mr. LAWRENCE:

Q. I didn't ask you about that ditch, have you noticed that ditch?
A. Yes sir, I know something about the ditch.
Q. Now to cut a ditch like that, what is it reasonably worth?
A. Well, it would cost fifty or sixty dollars to put it there.
Q. Would it be worth that much, you think?
A. Yes sir.
Q. Now, which do you put it at, fifty or sixty?
A. Sixty dollars.

Mr. MARTIN:

Q. Now there is about two miles of fence, that Mr. Reynolds built on the land?
A. Two or three miles all together, I don't know just what it would be in all, it runs clear around the place, and then across fence.
Q. This is a fence built with three wires?
A. Yes sir.
Q. They were old, when built in 1905?
A. Yes sir, I suppose it was.
Q. They were old wires?
A. Yes sir.
Q. It would not be worth anything in the course of four or five years would it?
A. Yes sir.
Q. How long would barbed wire last, ordinarily, what is your experience?
A. Well, if it is taken care of, it lasts a good long while.
Q. Well, doesn't it rust?
A. Yes sir.
108 Q. The weather corrodes it, and causes it to rust?
A. Yes sir.
Q. Now taking an old wire fence, if it would last four years, that would be a good long life for it?
A. No sir, it will last a little longer than that.
Q. How much longer than that does a wire fence ordinarily last out here on the prairie?
A. A wire fence, put up there fourteen or fifteen years old.
Q. There was new wire put into the fence though?

A. Yes sir.
Q. Do you have to fix up the wire fence every year?
A. Yes sir.
Q. And put in new wires?
A. No sir, keep it in place.
Q. You have to do that every year?
A. Yes sir.
Q. That is up and down every year?
A. Yes sir, if it gets cut or broke.
Q. Now building a rod of wire fence, of second hand wire, of three wires, in this country, where the posts are taken from the land, the building would not cost more than ten cents a rod, would it?
A. If you had to make them and put them in it would cost more than that.
Q. Wire fence after it is built, and has stood three, four or five years wouldn't be worth any more than when it was built?
A. No sir.
Q. In that time the wire would have rusted some, and become broken, to some extent would it not?
A. Yes sir.
Q. The posts would rot some too?
A. Yes sir.
Q. Red-oak posts would not last over five years in wet ground, would they?
A. No sir, that would be a pretty good life for them.
109 Q. Five years is about as long as they will last?
A. Yes sir, about it.
Q. If this fence cost in the first place about fifty dollars, and these red-oak posts been set in the ground for the last four years, it would hardly be worth two hundred dollars?
A. I expect it cost more than fifty dollars.
Q. This wire is somewhat expensive then, is it not?
A. Yes sir, it is.
Q. This orchard has never born- any fruit of any consequence, that you know of, has it?
A. They had peaches and a few apples last year.
Q. Now you say these houses are worth two hundred and twenty-five dollars?
A. They would be to me; I think they would have cost that much.
Q. They would cost that much now, you think?
A. Yes sir.
Q. They are not better now than when they were built, are they?
A. No sir.
Q. Are the roofs shingles or not?
A. Yes sir.
Q. All roofed with shingles?
A. Yes sir, I expect the side room just has boards over it.
Q. This log-house was built there in 1904?
A. Yes sir, something like that, it was standing there when I came there.

Defendant rests.

(Rebuttal Testimony for Plaintiff.)

Mr. MOMAN being called as a witness for the plaintiff, testified as follows:

Direct examination.

By Mr. MARTIN:

Q. Mr. Moman, you are a farmer, I believe?
A. Yes sir.
110 Q. Do you know this land in controversy?
A. Yes sir.
Q. Now have you had any experience in clearing land?
A. Yes sir, a good deal.
Q. Did you ever have any experience of that kind in the neighborhood of this land?
A. Yes sir, I put in a hundred acres right close there.
Q. Do you mean timber?
A. Yes sir.
Q. Do you know the character of the timber that grew on this land?
A. Yes sir.
Q. Do you know what it is worth an acre to clear land?
A. Yes sir, I think I do, I know what they paid at that time.
Q. What is it worth?
A. They paid on an average of five dollars, and along there.
Q. Five dollars an acre, you mean?
A. Yes sir.
Q. Now do you know the condition of the fencing on this farm, its condition at the present time?
A. No sir, I don't.
Q. You don't know that?
A. No sir.
Q. You don't know the present condition of the houses there do you?
A. Why, I have been there, that is I passed along the road by them. I don't know anything about their condition, they appeared to be good.

Cross-examination.

By Mr. LAWRENCE:

Q. What did I understand you to say it was worth to clear land, how much per acre?
A. Why, land right by that, they got five dollars per acre.
Q. For clearing it?
A. Yes sir.
Q. In what condition was it?
111 A. Well, it was apparently scattering timber on it and brush.
Q. Well, was it in the same condition as this land?

A. A good deal the same condition.
Q. A good deal the same condition?
A. Yes sir, some of this appeared to be a little bit hearier.
Q. What land do you have reference to?
A. The up land?
Q. Heavier timber?
A. Yes sir, appeared to be.
Q. Was there a heavy under-brush, or under-growth?
A. Some of it was, and some not as heavy.
Q. You would have to grub it down considerably?
A. Not a great deal, it was broke up——
Q. You just cut if off, in order to get it ready for crops?
A. No sir, cut it off and then they broke it and farmed it.
Q. Pile the brush and burn it?
A. Why then, cut it off and broke it up and put it in, and then cut the sprouts down afterwards you know. It takes four or five years to get it in a good state of cultivation.
Q. Well, do you mean to say it is only worth five dollars an acre to clear this up, and doing all this for four or five years?
A. That is what they paid for the first work; I didn't say what it was worth to go ahead with it, and put it in a good state of cultivation.

Mr. MARTIN:

Q. Well, Mr. Moman, in regard to this land Mr. Reynolds had put in cultivation there, in question, that was covered with timber, how was it?
A. Why some of it;—that is just like all the other land in that country, I thought it was about an average piece of land.
Q. About the average?
A. Yes sir.
112 Q. In your judgment it would be worth five dollars an acre?
A. Some of it might have been considerable work, but then theer was some grass land in the bottom.

(Testimony is closed.)

Mr. HENDERSON: The plaintiff asks the court to declare the law to be that under the pleadings, the evidence, and the facts in this case, that the defendant cannot recover upon his claim for improvements.
The COURT: I will rule on that request in my remarks.
Mr. HENDERSON: We will except.

Findings.

The court finds from the evidence, that the defendant, prior to the institution of this suit, had expended in improvements upon the property sued for the sum of six hundred and five dollars; and that he has also paid the state and county taxes assessed against the prop-

erty for the year of 1908, making a total of six hundred and thirty eight dollars.

The court further finds from the evidence, that since the institution of this suit, and since the defendant had notice that the title to the property was claimed to be in George Solander, — has — improvements upon the property in suit, amounting to the sum of Seven hundred and fifty dollars.

The court further finds, that the reasonable rental value of the property in question, from the institution of this suit, from the 7th day of September, 1905 to the 3rd day of December, 1908 is six hundred dollars.

113 The court holds, and decides as a matter of law and equity, that the defendant is entitled to off-set the rents, by the value of the improvements placed upon the premises, prior to the institution of this suit, and that the defendant is not entitled to judgment against the plaintiff, the lessor of George Solander, for any improvements placed upon the land and premises since the institution of this suit.

The court finds, that upon the death of Hettie Solander, being the owner of the lands in dispute, that the title to the same vested in her father, George Solander, and that Phœbe Trusler, the aunt of the said Hettie Solander, has not interest in the same.

Judgment will, therefore, be ordered against the defendant, and in favor of the plaintiff for the possession of the premises, sued for, and for his costs herein laid out and expended.

To all of which the defendant excepts; the plaintiff also excepts to that portion of the judgment of the court declaring that the defendant is entitled to off-set any part or portion of the improvements against the rents and profits of the premises.

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Joseph Willoughby, the duly appointed, qualified and acting Court Stenographer, in and for the First Judicial District of the above state, acting in and for the Twenty-first Judicial District thereof, do hereby certify that the above and foregoing is a true, correct and complete transcript of my stenographic notes, taken upon the trial of the above entitled cause, at the time and place therein set forth.

JOSEPH WILLOUGHBY,
Court Stenographer.

114 And thereupon on the 25th day of May, 1909, judgment was duly entered of record in said cause in favor of plaintiff and against the defendant John T. Reynolds, in words and figures following, to-wit:

No. 1123.

WILLIAM M. FEWEL, Plaintiff,
vs.
JOHN T. REYNOLDS et al., Defendants.

Judgment.

Now on this 25th day of May, 1909, this cause comes on for hearing, plaintiff appearing in person and by Hainer & Martin and J. J. Henderson, his attorneys, and defendant, John T. Reynolds appearing in person and by Lawrence & Lawrence, his attorneys, and a jury being waived, this cause is submitted to the Court.

And the Court having heard the testimony offered on behalf of plaintiff and defendant and having heard the argument of counsel, and being fully advised in the premises did find as follows:

"The Court finds from the evidence that the defendant prior to the institution of this suit had expended in improvements on the land sued for the sum of $605.00; that he also paid State and County taxes assessed against the property for the year 1908, making a total of $638.00.

The Court further finds from the evidence that since the institution of this suit and since the defendant had notice that the title to the property was claimed to be in George Solander, he has made improvements upon the property in suit, amounting to $750.00.

The Court further finds that the reasonable rental value of the property in question from the institution of this suit on the 7th day of September, 1906, to the 3rd day of December, 1908, is $600.00.

115 The Court holds and decides as a matter of law and equity, that the defendant is entitled to offset the rents by the value of the improvements placed upon the premises prior to the institution of this suit and that the defendant is not entitled to judgment against the plaintiff, the lessor of George Solander, for any improvements placed upon the land and premises since the institution of this suit.

The Court finds that upon the death of Hettie Solander, she being the owner of the lands in dispute, that the title to the same vested in her father, George Solander, and that Phœbe Trusler, the aunt of the said Hettie Solander, has no interest in the same.

Judgment will therefore be ordered against the defendant and in favor of the plaintiff for the possession of the premises sued for and for his costs herein laid out and expended.

It is therefore considered, ordered and adjudged by the Court, that the plaintiff have and recover of and from the defendant, John T. Reynolds, the possession of the property described in the petition herein as follows, to-wit:

South-east Quarter of Section Thirty (30) Township Nineteen (19) North, Range Thirteen (13) East, containing 160 acres, and lying and being situated in Tulsa County, State of Oklahoma;

and that he recover his costs herein laid out and expended and have therefor execution.

To all of which defendant excepts; plaintiff also excepts to that portion of the findings and judgment of the court declaring that the defendant is entitled to offset any part or portion of the improvements against the rents and profits of the premises. Which exceptions are allowed by the Court.

116 And thereafter, to-wit, on the 26th day of May, 1909, the defendant, John T. Reynolds, filed the following motion and grounds for new trial, to-wit:

In the District Court within and for Tulsa County, State of Oklahoma.

No. 1123.

WILLIAM M. FEWEL, Plaintiff,
vs.
JOHN T. REYNOLDS et al., Defendants.

Motion for New Trial.

Comes now said defendant John T. Reynolds and moves the court to vacate and set aside the judgment rendered herein on the 25th day of May, 1909, and to grant a new trial for the following causes which affect materially the substantial rights of said defendant:

(1) Error in assessment of the recovery by defendant.

(2) The decision and judgment of the court is not sustained by sufficient evidence.

(3) The judgment of the court is contrary to law.

(4) Error of law occurring at the trial, and excepted to by defendant.

LAWRENCE & LAWRENCE,
Attorneys for said Defendant.

21st Judicial Dist., Tulsa Co., Okla. Filed in open court May 26, 1909. W. W. Stuckey, Clerk District Court.

117 And thereafter on the said 26th day of May, 1909, the court overruled said motion, to which action of the court in overruling said motion for new trial said defendant excepted and excepts, and thereupon said defendant, John T. Reynolds, praying an appeal to the Supreme Court and an extendion of time in which to make and serve case made, the court ordered that an extension of sixty days be allowed for said defendant to make and serve case made, plaintiff to have ten days thereafter to suggest amendments and the same to be settled upon ten days' notice in writing by either party; and thereafter, on the 29th day of May, 1909, there was filed in said cause a journal entry overruling said motion for new trial and allowing appeal as aforesaid, which is in words and figures as follows, to-wit:

In the District Court within and for Tulsa County, State of Oklahoma.

No. 1123.

WILLIAM M. FEWEL, Plaintiff,
vs.
JOHN T. REYNOLDS et al., Defendants.

Order Overruling Motion for New Trial and Allowing Appeal.

Now on this 26th day of May, 1909, the above entitled cause came on to be heard on motion of defendant to vacate and set aside the judgment rendered herein on the 25th day of May, 1909, and to grant defendant a new trial for the reasons set out in defendant's motion for new trial filed on the 26th day of May, 1909, and plaintiff appearing in person and by his attorneys J. J. Henderson and Hainer & Martin, and defendant appearing in person and by his attorneys, Lawrence & Lawrence, and said motion being taken up and considered, is by the court overruled, to which action of the court in overruling said motion, defendant duly excepted.

118 And said defendant praying an appeal to the Supreme Court and an extension of time within which to make and serve case made, it is ordered that an extension of sixty days from this date be granted said defendant to make and serve case made, plaintiff to have ten days thereafter to suggest amendments and same to be settled on ten days' notice in writing by either party.

And upon application of said defendant for a supersedeas, it is ordered that the same be and is hereby allowed upon defendant giving a good and sufficient bond to the plaintiff in the sum of One Thousand ($1,000.00) Dollars, to be given within twenty days from this date, and upon approval of said bond by the Clerk of this Court, the judgment of this court to stand suspended and execution stayed until the decision of the Supreme Court and the further order of this court.

JOHN H. PITCHFORD,
Judge of the District Court.

21st Judicial Dist., Tulsa Co., Okla. Filed in open court May 29, 1909. W. W. Stuckey, Clerk District Court.

And thereupon on the 11th day of June, 1909, said defendant, John T. Reynolds, duly filed his said bond which was duly approved by the Clerk of said Court.

119 In the District Court of Tulsa County, Oklahoma.

WILLIAM M. FEWEL, Plaintiff,
vs.
JOHN T. REYNOLDS et al., Defendants.

We hereby certify that the foregoing case made contains a full, true, correct and complete copy and transcript of all the proceedings in said case including all pleadings filed and proceedings had, all the evidence offered or introduced by both parties, all orders and rulings made and exceptions allowed, and all of the record upon which the judgment and journal entry in said cause were made and entered, and that the same is a full, true, correct and complete case made.

Witness our hands this 21st day of July, 1909.

LAWRENCE & LAWRENCE,
Attorneys for Defendant John T. Reynolds.

STATE OF OKLAHOMA,
Tulsa County, ss:

We the undersigned, attorneys for the plaintiff in the foregoing suit, hereby certify that the foregoing case — was duly served on us on the 21st day of July, 1909.

HAINER & MARTIN,
Attorneys for Defendant John T. Reynolds.

120 In the District Court within and for Tulsa County, State of Oklahoma.

No. 1123.

WILLIAM M. FEWEL, Plaintiff,
vs.
JOHN T. REYNOLDS et al., Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the foregoing case made may be settled immediately and without notice, and the parties hereto request that the Judge of said Court do settle the same as a full, complete and correct case made in said cause and order the same certified to the Clerk of the District Court to be filed according to law.

Dated at Tulsa, Oklahoma, this 16th day of August, 1909.

HAINER & MARTIN,
Attorneys for Plaintiff.
LAWRENCE & LAWRENCE,
Attorneys for Defendant John T. Reynolds.

121 STATE OF OKLAHOMA,
Tulsa County:

In the District Court.

No. 1123.

WILLIAM M. FEWEL, Plaintiff,
vs.
JOHN T. REYNOLDS et al., Defendants.

I, the undersigned, Judge of said District Court, hereby certify that the foregoing was presented to me as a case made in the action above entitled by the parties to said cause; that the same was duly served in due time and that no amendments thereto have been suggested; that the same as above set forth is true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings and judgments had in such cause, and I now settle and sign the same as a true and correct case made, and direct that it be attested and filed by the Clerk of said Court.

Witness my hand at Tahlequah in Cherokee County, Oklahoma, this 19 day of August, 1909.

[SEAL.] JOHN H. PITCHFORD,
District Judge.

Attest:
W. W. STUCKEY,
Clerk of the District Court.

Certificate of True Copy.

STATE OF OKLAHOMA,
Tulsa County, ss:

I, W. W. Stuckey, clerk of the District Court in and for the County and State aforesaid, do hereby certify that the instrument hereto attached is a full, true, and correct copy of record and case made in the above case.

Witness my hand and the seal of said Court at Tulsa, Oklahoma, this 22nd day of Mch. 1910.

[SEAL.] W. W. STUCKEY,
Clerk of the District Court.

122 Endorsed: No. 1123. Fewell v. Reynolds et al. Case made, which includes the entire Record. Filed Aug. 21, 1909. W. W. Stuckey, Clerk District Court.

Endorsed on back of case made: 1680. Supreme Court Okla. John T. Reynolds, Plff. in error, v. William M. Fewell, Deft. in error. Petition in error. Transcript of Record and case made. William R. Lawrence, Atty. for Plff. in error. Filed May 13, 1910. W. H. L. Campbell, Clerk.

123 And thereafter, to-wit: on the 16th day of January 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, January Term, 1912, January 16th, 1912, Sixth Judicial Day.

1680.

JOHN T. REYNOLDS, Plaintiff in Error,
vs.
WILLIAM M. FEWEL, Defendant in Error.

And now this cause is submitted on the record and briefs filed herein.

124 And thereafter, to-wit: on the 19th day of March, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, March Term, 1912, March 19th, 1912, Sixth Judicial Day.

1680.

JOHN T. REYNOLDS, Plaintiff in Error,
vs.
WILLIAM M. FEWEL, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the lower court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the lower court in the above cause, be, and the same is hereby affirmed.

Opinion by Rosser, C.

By the COURT: It is so ordered, the above opinion is hereby adopted in whole, and judgment is entered accordingly.

125 In the Supreme Court of the State of Oklahoma.

(Filed Mar. 19, 1912.)

No. 1680.

JOHN T. REYNOLDS, Plaintiff in Error,
vs.
WILLIAM M. FEWEL, Defendant in Error.

Error from District Court, Tulsa County.

John H. Pitchford, Judge.

Syllabus.

1.

An enrolled Creek woman died in October, 1899, leaving surviving her husband, a white man not enrolled, and a daughter, and a sister. In 1899, after the mother's death, the daughter died unmarried and without issue. An allotment in the name of the woman's heirs was made in December, 1901, Held:

(1) That the entire estate of the allotment vested in the husband.

(2) That the fact he was of white blood did not prevent him from inheriting, under the Creek law, as heir to his wife and daughter.

2.

Sec. 2644, of Mansf. Dig., of the Statutes of Arkansas, which provides that, "if any person believing himself to be the owner either in law or equity, under color of title, has peaceably improved any land which, upon judicial investigation, shall be decided to belong to another, the value of the improvements made" are to be paid by the successful party before he can obtain possession, does not entitle a defendant to compensation for improvements made after suit brought against him for the land.

Action by Wm. F. Fewel, against John T. Reynolds.
Judgment for Plaintiff, and defendant appeals.
Affirmed.
Wm. R. Lawrence, for Plaintiff in Error.
Hainer & Martin, for Defendant in Error.

126 *Opinion by Rosser, C.*

This was an action by Wm. M. Fewel against John T. Reynolds to recover certain lands in the Creek Nation. The suit was brought in the United States Court for the Western District of the Indian Territory, and after statehood was transferred to the District Court of

Tulsa County, Oklahoma, where it was tried and judgment rendered for plaintiff, and defendant has appealed. The lands in controversy were a part of the allotment of Minnie Solander, deceased, who was a member of the Creek tribe of Indians and of Creek blood. Minnie Solander left surviving her a daughter, Hettie Solander, and her husband, George A. Solander, who was a white man, not enrolled, and a sister, Phœbe T. Trussler. Minnie Solander died in October, 1899, before her allotment had been selected. Her daughter, Hettie Solander, died, unmarried and without issue, in November, 1899, before the allotment of Minnie Solander had been selected. The plaintiff claims the land under a conveyance from George A. Solander; the defendant under a conveyance from Phœbe Trussler.

The question raised by the defendant may be considered under two heads. First: That the Court erred in holding that George A. Solander inherited his wife's allotment. Second: That the Court erred in holding that the defendant was not entitled to a judgment for the improvements made by him after the suit was brought.

The defendant contends that because George A. Solander was a white man, and not a member of the Creek Tribe, he could not inherit under the Creek law. The parties stipulated that the
127 Creek law of descents and distributions was as follows:

"Sec. 6. Be it further enacted, that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons, and in all cases where there are no children the nearest relation shall inherit the property. Laws of the Muskogee Nation 1880. P. 132."

"Sec. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no other heirs, and an heir's part if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner. Laws of Muskogee Nation 1890, p. 60."

And the following was the law as it affected the rights of non-citizens.

"Sec. 1. All non-citizens, not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have a right to live in this Nation, and enjoy all the privileges enjoyed by citizens, except participation in the lands. Laws of Muskogee Nation, 1890, p. 60."

When the agreed statement was offered in evidence the defendant objected to it, but not upon the ground that it did not contain all the Creek law. The objections made were overruled. The defendant devotes a considerable portion of his brief to showing that this Court should take judicial notice of the Creek law of descents and distribution-, and that the Creek law will not permit a white man to inherit the lands of a member of a tribe.

There is no doubt that the Creek law of descent- and distributions, having been made the rule governing the devolution of a considerable portion of real property of the State, should be judicially noticed. No time need be taken upon that question. But defendant contends that the stipulation did not contain all the Creek law on

the subject, and that, considering all the Creek law, the Court should hold that a white man cannot inherit. He also contends
128 that parties cannot by stipulation bind the court as to matters of law, or matters of which it should take judicial notice. Without deciding this last question, it is sufficient to say that in the case of De Graffenried v. Iowa Land & Trust Co., 20 Okla., 687, this Court, in an able and exhaustive opinion by Mr. Justice Turner, after considering the Creek statutes and several decisions of the Supreme Court of the Muskogee Nation, including the case of Fisher v. Muskogee Nation, in which the rights of John T. Rogers, who was an intermarried white man, were involved, decided that a white husband could inherit from his Creek wife. A brief notice will be given some other decision by Creek judges, referred to in the brief of defendant, (Plaintiff in Error). The opinion rendered by Is-par-he-chee to L. C. Perryman, October 31st, 1893, does not conflict with the decision in the de Graffenried case. The opinion of T. J. Adams, Chief Justice, rendered to the Principal Chief August 5th, 1896, holds merely that a non-citizen cannot share in the common property of the tribe. The opinion of Chief Justice John Goat, rendered October 22nd, 1896, tends to uphold the view that non-citizens could inherit property not tribal in its character. After the allotment of land was made it ceased to be tribal property, and it must be taken as settled law of the State that under such circumstances a white person can inherit an allotment in the Creek Nation. De-Graffenried v. Iowa Land & Trust Co., 20 Okla., 687, 95 Pac., 624; Morley v. Fewel, not yet officially reported; Shellenbarger v. Fewell, not yet officially reported.

The proof showed that defendant, while in possession of the lands in controversy, under color of title had made improvements
129 of considerable value. A part of the improvements were made before this suit was brought, and the Court made that part a charge against the plaintiff. He held that defendant was not entitled to compensation for improvements made after the suit was brought. The defendant assigns this holding as error.

The section of Mansfield's Digest, which gave to defendants, in possession of land under color of title, the right to a judgment for the improvements, is as follows:

SEC. 2644. "If any person believing himself to be the owner, either in law or equity, under color of title, has peaceably improved or shall peaceably improve any land, which upon judicial investigation shall be decided to belong to another, the value of the improvements made as aforesaid and the amount of all taxes which may have been paid on said land by such person, and those under whom he claims, shall be paid by the successful party to such occupant or the person under whom or from whom he entered and holds, before the Court rendering judgment in such proceeding shall cause possession to be delivered to such successful party."

This section is part of the ejectment statutes of Arkansas, as contained in Mansfield's Digest, and was extended over the Indian Territory by Act of Congress of March 1st, 1889. Wilson v. Owens, 1 Indian Territory, 163, affirmed in 86 Fed. Rep. 571. See also Har-

deman v. Turner, 3 Indian Territory, 338; White v. Brown, 1 Indian Territory, 98.

It was not error to limit the defendant's right of recovery for improvements upon the land to the value of such improvements as were made prior to the bringing of the suit. To entitle a defendant to recover for improvements, made under the Arkansas Statutes, they must have been placed upon the land in good faith, and under an honest belief by the person making them that he was the owner of the land. To permit one, against whom suit had been
130 brought to recover lands, to recover for improvements made by him after suit was brought might result in as great, or greater, injustice to the owner of the land than would result to the defendant, should recovery for any improvements be denied him. Such a holding would put it in the power of the defendant to place enough improvements upon the land, after suit was brought, to prevent the plaintiff from regaining the actual possession for such a length of time as to amount to a denial of justice, and would permit the defendant, in effect, to improve the plaintiff out of his land after he had been sued, and thereby given to understand that the plaintiff claimed and intended to assert a title.

In Shaw v. Hill, 46 Ark. 333, it is said:

"As a general rule, only the bona fide occupant is entitled to mitigate an owner's claim for damages and mesne proffits, by offsetting the value of his improvements, or to compensation therefor, under the laws of this state. It would be manifestly inequitable to the owner, and, indeed, highly dangerous policy, to make allowances to one for the expenditures he has made for improvements, in disregard of the owner's rights, with full knowledge of his claim."

In Fee v. Cowdry, 45 Ark., 410, the Court said:

"Was Sewell a bona fide occupant? In Green v. Biddle, 8 Wheat., 79, Mr. Justice Washington, in delivering the opinion of the Court said: He is one 'who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person, claiming a better right to it. Most unquestionably this character cannot be maintained, for a moment, after the occupant has notice of an adverse claim, especially if that be followed by a suit to recover the possession. After this he becomes a mala fide possessor, and holds at his peril, and is liable to restore all the mesne profits, together with the land.

In Beard v. Dansby, 48 Ark., 183, the Court, in construing the stotute above quoted, said:

131 "Good faith, in its moral sense, as contradistinguished from bad faith, and not in the technical sense in which it is applied to conveyances of title, as when we speak of a bona fide purchaser, meaning thereby a purchaser without notice, actual or constructive, is implied in the requirement that he must believe himself the true proprietor. It must be an honest belief, and an ignorance that any other person claim a better right to the land. Fee v. Cowdry, 45 Ark., 410; Shaw v. Hill, 46 ib., 333."

All these decisions were construing sections 2644 and 2645 of

Mansfield's Digest, and were rendered prior to the Act of Congress extending those sections over the Indian Territory.

In Edrington v. Jefferson, 14 S. W., 99, 33 Ark., 545, rendered after those sections were extended over the Indian Territory, where the question was as to the effect of the same statute, Justice Cockrill said:

"The established rule is that such a claim can be successfully asserted only by one who is a bona fide occupant; and, to constitute such occupancy, the statute requires that the possession should be peaceable. Suit for the possession is the highest evidence of hostility to the possessor's right." See also Beasley v. Equitable Securities Co. 72 Ark., 601.

The judgment should be affirmed.

March 19, 1912.—By the Court: Adopted in whole.

132 In the Supreme Court, State of Oklahoma.

No. 1680.

JOHN REYNOLDS, Plaintiff in Error,
vs.
WILLIAM FEWELL, Defendant in Error.

Petition for Rehearing.

Comes now said plaintiff in error and respectfully represents that on the 19th day of March, 1912, a decree and judgment was rendered by this Court in said cause that the judgment of the trial court be affirmed, which judgment was in favor of defendant in error, deciding that he was the lessee of the owner in fee of the land in question and was entitled to the immediate possession of the same as against plaintiff in error; and that the claim of plaintiff for improvements made upon the land prior to the commencement of this action was allowed, and that the lessee and defendant in error was entitled to rents and profits to the amount of the value of said improvements, and gave said defendant in error judgment for possession and the costs.

1. The said decision and judgment of this honorable Court overlooked a question decisive of the right of plaintiff in error to recover for improvements made subsequent to the commencement of the action, that is to say, after November 10, 1905, in this, that, under section 2644 of Mansfield's Digest, set forth at length on page 5 of typewritten opinion of the Court, an occupant of land after commencement of suit by one entitled to the immediate possession, could not recover for improvements made upon the land thereafter, because they were not "peaceably made" under the terms of that statute, and therefore the plaintiff was thereafter an occupant mala fide, and could not recover for improvements thereafter made.

133 In support thereof, this honorable Court cited the follow-

ing cases decided by the Supreme Court of Arkansas construing this statute after its adoption by Congress:

Fee v. Cowdry, 45 Ark. 410;
Bread v. Dansby, 48 Ark. 183;
Shaw v. Hill, 46 Ark., 333; and
Edrington v. Jefferson, 53 Ark. 545.

The facts in the first case cited are substantially these: The widow of a former owner of the land upon his death became the owner of it during her life, with remainder to the sisters of deceased. The widow died September 5, 1882. November 24, 1871, she made a conveyance of the whole estate to Kellow, and he conveyed to Camp in 1873, and he to Sewell July 4, 1875, representing that he had good title. Sewell took possession and held the same. While so possessed he made lasting and valuable improvements thereon and paid the taxes to the death of the life tenant. The trial court rendered judgment in favor of appellants against Sewell for the land and costs, and withheld writ of possession until payment of $725, after deducting rents, should be made to Sewell. The appellants assigned error in the court instructing the jury to assess the value of the improvements made before the 8th of March, 1883.

The Court in its opinion (p. 417) says:

"The improvements were made during the lifetime of Margaret Meyers. * * * Is Sewell entitled to compensation for improvements under the statute? As a rule improvements made by a life tenant, during the existence of the life estate, are referred to their interest in the land, and for them they would not be entitled to compensation. But it is different in this case. For a valuable consideration, Camp pretended to convey to Sewell, in fee simple, by warranty deed, the land in controversy. Sewell believed that he thereby became the owner in fee simple. In this faith he, peaceably, made valuable and lasting improvements. Under this state of facts, he is entitled to pay for the improvements."

And in support of this construction of the statute the Court quotes a Massachusetts case, from which it appears that under a statute of that state when an occupant for six years, next before action begun, shall recover for improvements made, and the Court further says:

134 "'The tenant shall also be entitled to like compensation, although the premises should not have been so held so long as six years, provided he holds them under a title which he had reason to believe good. The land had been conveyed by deed purporting to convey fee-simple title, and he took possession claiming the entire interest in the land.'"

And the Court also quotes from the case of Green v. Biddle, 8 Wheat. 790, the definition of a bona fide occupant:

"'He is one who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it. Most unquestionably this character cannot be maintained for a moment after

the occupant has notice of an adverse claim, especially, if that be followed up by a suit to recover possession. After this he becomes a mala fide possessor, and holds at his peril, and is liable to restore all the mesne profits, together with the land.'

"Sewell was a bona fide occupant, and unquestionably held under color of title. * * * If he had taken nothing by his deed he would most unquestionably have been entitled under the statute to compensation for his improvements. The failure to get what he had purchased and intended to hold and improve, and believed he had held and improved, but something else should not defeat his right to compensation for improvements."

The case of Shaw v. Hill was this: In 1879, Shaw rented to Hill the land in controversy who agreed to pay the taxes for 1878 and 1879, and a reasonable sum besides; and Shaw further agreed to give credit for value of improvements made for 1880. Possession was taken by Hill January 1, 1880. The land was returned delinquent for taxes 1878. Hill failed to pay or redeem, and let the land remain delinquent for one year, and June, 1880, attempted to redeem and take a deed in his own name under an Arkansas statute. He claimed the land under this deed, held adverse possession thereof, made improvements thereon, before and after action begun, all the time knowing that Shaw was claiming it. The Court allowed for the improvements made in 1880, but held that the other improvements were made under a pretended title acquired in violation of his contract.

"He is therefore not a bona fide occupant and not entitled to offset plaintiff's claim for rents with the value thereof."

The judgment of the trial court was reversed.

In Beard v. Dansby, the action was ejectment; the defendant did not deny plaintiff's title, but asked for value of improve-
135 ments and taxes paid. He pleaded that he entered upon the land in 1868, under a deed with covenants of general warranty, which purported to convey an estate in fee simple; that the land was wild and unimproved, and believing his title perfect in his right of possession undisputably peaceably, made improvements of value of $2,000 and paid $150 taxes.

The trial court held that the claim for betterments was not within the provisions of section 2644, Mansfield's Digest. The Supreme Court, in comment, says:

"The Court may have been led to this conclusion by the fact that plaintiff's title was of record when defendant purchased the land from another party, or by the fact the improvements were made and the present action had been brought before the passage of the act, or by the fact that the plaintiff was an infant at the time the improvements were in progress."

* * * * * * *

"The only requirements of the act are that the occupant should have had peaceable possession, at the time the improvements were made, under color of title and under the belief that he was the owner of the land. Any instrument having a grantor and grantee,

and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title."

"Good faith, in its moral sense, as contra-distinguished from bad faith, and not in the technical sense in which it is applied to a conveyance of title, as when you speak of a bona fide purchaser, meaning thereby a purchaser without notice, actual or constructive, is implied in the requirement, that he must believe himself the true proprietor. It must be an honest belie*ve*, and an ignorance that any other person claims a better right to the land."

In a previous part of this opinion, the court says:

"But the constructive notice of an adverse title, which the law implies from the registry of a deed, is not sufficient to preclude an occupant to recover for improvements if he in fact purchased in good faith and under supposition that he was obtaining a good title in fee."

The judgment of trial court reversed.

I. In Jefferson v. Edrington, so much of the case as pertains to the one at bar is this: The land was in the hands of a receiver in the state court, and had been sold by decree of that court to one McCombs and Jefferson. McCombs conveyed his interest to Jefferson. The case was taken to U. S. Supreme Court and remanded to State Court. The state court on resuming jurisdiction required Jefferson to surrender to the receiver. The decree under
136 which he purchased was conceded to be void. He contended that he had peaceably improved the land under color of title believing he was the owner, and asked for pay for his improvements and not to be accountable for rents, except for the period fixed by the betterment act—for three years prior to being made a party to the suit. The Court says:

"The established rule is that a claim can be successfully asserted by one who is a bona fide occupant, and to constitute such occupancy the statute requires that such possession should be peaceable. But possession which is contested by litigation is not peaceable. Suit for possession is the highest evidence of hostility to the possessor's right. Litigation prior to Jefferson's title was pending during the whole period of his possession. * * * From time to time pending the suit and prior to the decree in the United States court, he had purchased at a heavy discount from parties to the record a large majority in value of the debts secured by the trust deed and before any improvements were made upon the land, he had become p*ar*ctically the sole beneficiary under that instrument. * * * And it was stipulated that Jefferson took McCombs' interest subject to all hazards of the appeal. * * * His reliance was placed on the advice of counsel to the effect that the appeal could not affect his title. * * * He knew that his title was contested; his possession was not peaceable, and he was not a bona fide occupant within the meaning of the statute."

"But he was not a willful tort-feasor. There is no doubt that he honestly relied upon the advice of counsel and that goes far toward

establishing good faith. Searl v. School District, 133 U. S. 553. The receiver who was never legally discharged, acquiesced in his possession pending the appeal, and is now legally entitled to receive the rents as though Jefferson had held as his tenant. It is therefore but equitable in demanding the rents which accrued before the receiver received possession to allow Jefferson to set off against them whatever charges the court would have allowed the receiver if he had cultivated the lands under his direction. That would include taxes, necessary repairs, and such improvements as a prudent man would have deemed necessary to sustain the estate."

The case of Searl v. School District, 133 U. S. 553 (1889), cited in Jefferson v. Edrington, supra, is this: The officers of a School District purchased a site for a school-house from an occupant holding under a squatter right, another out of possession claimed it under a placer patent, and the said officers having notice of these disputed claims consulted reputable legal counsel and *was* advised the squatter had the better right and relying upon this gave the squatter $3,500 for the site, took possession and built thereon a school-house of the value of $40,000. The placer patentee brought ejectment, and thereupon the officers obtained a restraining order, being advised that the placer patentee was the true owner, and prosecuted condemnation proceedings. Therein the patentee claimed
137 for the value of the improvements as well as the value of the land. The court denied the claim for improvements and allowed $3,000 for the value of the land. On final hearing in the United States Supreme Court opinion by the Chief Justice, it was held:

"Good faith is doubtless here used in its popular sense as the actual existing state of the mind; whether so from ignorance, scepticism, sophistry, delusion, fanaticism, or imbecility, and without what it should be from given legal standards of law or reason. * * * The good faith required by the statute in the creation or acquisition of title, is a freedom from a design to defraud the person having a better title. The knowledge of an adverse claim to, or lien upon property, does not of itself indicate bad faith in the purchaser, and is not even an evidence of it, unless accompanied by some improper means to defeat such claim or lien."

It further states:

"We are of the opinion that the plaintiff in error could not successfully contend that the school district should be treated as a naked trespasser. * * * And courts of equity in accord with the principle of the civil law, when their aid is sought by the real owner compel him to make allowance for permanent improvements, made bona fide, by a party lawfully in possession under a defective title."

It is clear from the above authorities, all of which appear in the opinion of your Honors, or authorities cited and followed by them, that the test of the right of an occupant to recover anything for improvements made or taxes paid, or even the right to recoup or set them off against mesne profits, is the bona fides with which they

are made, and under which possession is held. All the authorities agree that no one can acquire a right by means of fraud or wrong willfully done.

It is true that the common law did not distinguish in such cases between the act being done willfully or unlawfully—that is contrary to the strict letter of the law, but the statute removes all question upon this point, particularly the statue under consideraion, which is probably the most liberal of any of the states and all of them by statute have made provision for a bona fide occupying claimant to recover for betterments.

We assume that the court will take cognizance of the fact, as part of the legal history of the country, that the state of Ken-
138 tucky, among the first, soon after its Statehood, passed a law for the benefit of occupying claimants, which was occasioned by the conflict of boundaries and titles between the early settlers, and the case of Green v. Biddle, cited in one of the Arkansas cases which has been referred to by this court in the opinion, was a case from Kentucky to test the constitutionality of the Kentucky law, which was held by the Supreme Court of the United States to be unconstitutional. But Kentucky and all the states have made their statutes within the inhibition of the National Constitution.

It would appear from the case of Searle v. School District, supra, that the Supreme Court has therein modified or limited the definition of good faith as defined in Green v. Biddle, putting it upon the broad ground that if the occupant made the improvements believing that he had the right to do so, under a possession obtained in good faith, and a supposed title, he was not "a naked trespass-," as used by Justice Cockrill in the case of Jefferson v. Edrington, supra. This plaintiff and petitioner went in under color of title and right, and honestly and prudently improved the land as an ordinarily prudent farmer would, enha-cing the value of the land equal to the value of the improvements, and $788 beyond the value of the mesne profits of $600 as found by the court (Ab. 25).

Before the occupying claimant act was passed by the legislature of Kentucky, its Supreme Court decided that at common law the occupant who had made improvements in good faith upon land after, as well as before, action by which he was evicted, which enhanced the value of the land is liable for rents and profits from the time he had notice of the adverse claim, on the principles of equity applicable to such cases. The trial court had decided that the value of the improvements made after suit commenced ought not to be allowed. The Supreme Court said,

"that cases might arise where such rule should prevail, as when unnecessary, expensive, useless, fanciful or ornamental improvements should be made or done with a design to put it beyond the power of the proprietor to pay for them."

The judgment of the trial court was reversed. Whiteledge v. Wait Sneed 35, 2 Am. Dec. 721 (1804).

139 An examination of many of the early decisions of Arkansas on this subject seem to have adopted said section 2644 of

Mansfield's Digest as to what state of facts should appear in order to put the evicted occupant of land within the favor of this statute providing for compensation for valuable and permanent improvements. We must respectfully submit that a close and careful examination of the several decisions of the Arkansas Supreme Court, and the cases therein cited, will show that they do not preclude this plaintiff in error from full compensation for his betterments, less the damage claimed by defendant in error in his complaint, being $500, the limit of his recovery.

We further justify this lengthy review of said authorities because of the general importance of it in the eastern part of the State when many of like character must necessarily arise in the courts, where so much litigation is pending, and will arise over the rights of occupants of vast numbers of contested allotments of the public domain of the Five Civilized Tribes therein, the greater number of which must necessarily come, in the first instance in the State court.

We insist that this petitioner and plaintiff in error should not be classed with the occupant who appears in the case of Shaw v. Hill, supra, who betrayed his landlord by attempting to cut him out of not only rents and profits but the land also, by allowing it to forfeit for non-payment of taxes which he had agreed to pay, and redeeming and receiving deed in his own name and claiming to be the legal owner thereunder. Such conduct was male fides of the highest grade, and the court could not have done otherwise than deny all relief except for some improvements made the first year of his occupancy in fulfillment of an agreement to do so. Our recollection is that in all of the other cases cited by your Honors from the Arkansas reports, the occupying claimants were within the good faith class, the same, to all intents and purposes, as this plaintiff.

140 The facts upon which this assertion is based are contained in the record. The 16th item of agreed statement of facts show- that he was in possession before September 7, 1905. He testifies that he went into possession September 20, *1905. He testifies that he went into possession September 20,* 1904,. Ab. 13; and on cross-examination, p. 15 Ab., says he bought of Phœbe Tresler, and there was no one in actual possession—"nothing in the way of possession—nobody in the way—nobody objected, and Fewell had no tenant there."

There was doubt and uncertainty as to who, at that time, would come within the description "of heirs" as used in the first Creek agreement. It all depended upon what construction would be given it by the highest court of the country. Opinions differed among the best of lawyers, and manifestly by the Creek Nation and Congress, as indicated by the Supplemental agreement made a little more than one year thereafter, in which it was expressly provided that all allotments should descend in the line of the Creek blood as long as there was any, and then to *be* non-citizen blood of the allottee if there was any.

The defendant did not have enough faith in the title to take more than a five-year lease. There is nothing to show that he spent a dollar on betterments or taxes. Plaintiff in error entered

into possession like many others upon lands in the same situation, and gave evidence of his belief that he had a good title by expending thereon over $2,000 in betterments and taxes, and when sued for possession by defendant in error, he has contested his right to such possession, presumptively, under the advice of counsel that he had a just and meritorious claim. Wherefore, we submit that whatever his legal right may be to such possession, under the circumstances, he acted honestly, within the definition of good faith as de-
141 fined in Searle v. School District, supra, decided March 3, 1890, about two months before the adoption of the Arkansas law by act of Congress, thereby becoming to all intents a law of the United States, and for the purposes of this case remains such law subject to construction by the same court which decided the last above mentioned case.

The importance of the question to a great many land holders of like titles and rights under the same law, in the Eastern part of the state, has justified the length of this petition.

As to the other point in the opinion and judgment of the court viz: "That the entire estate in question vested in the husband of the allottee, notwithstanding his white blood."

It is to be observed that the record shows he was a non-citizen of the Creek Nation, that Phœbe Tresler was a citizen of that nation and was a sister of Minnie Solander, not an allottee, but entitled to an allotment, if she had lived to receive it, but of the same blood as Phœbe. The selection of the allotment was made by her heirs, and certificate issued to them, and in due time a patent or deed far said land "to the heirs of Minnie Solander," it being, necessarily left to the determination of a court of competent jurisdiction to determine who they were and to specifically identify them.

This is a most important matter, involving a vast number of claimants throughout Eastern Oklahoma, and property of great value, personal as well as real—million in lands and the same in funds.

We submit that it is possible that your Honors may have overlooked the fact that this selection of land was made by the heirs of Minnie Solander, without name or other identification, and deeds, under the same description as to grantees were delivered to whom? The answer cannot be found in the record. But the 10th item of the agreed statement of facts show- that George Solander had abandoned his wife and child several months before their deaths, though he resided in the Nation. We cannot think that it was the
142 intention of the Creek Nation and the United States, that this allotment should directly pass to the non-citizen as is held in this case, as indicated by the public policy of both Nations in their many legislative acts and decisions of their highest courts which go to the extreme in favoring the Indian in all contests of rights of property between him and the white man, and resolving all of them in the sense and understanding of the Indian.

Wherefore, defendant in error prays that a re-hearing of said cause may be had by your honorable Court.

WILLIAM R. LAWRENCE,
Att'y for Pl'ff in Error.

Endorsed on back: No. 1680. Reynolds Pl'ff in error, — Fewell, Def't in Error. Petition for rehearing. Filed Apr. 3 1912. W. H. L. Campbell, Clerk.

143 And thereafter, to-wit: on the 4th day of June, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, May Term, 1912, June 4th, 1912, Eighth Judicial Day.

1680.

JOHN T. REYNOLDS, Plaintiff in Error,
vs.
WM. M. FEWEL, Defendant in Error.

And now on this day, it is ordered by the court, that the petition for rehearing filed herein, be, and the same is hereby denied.

144 In the Supreme Court of the State of Oklahoma.

Certificate.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 143 pages, numbered from one to 143, both inclusive, are a full, true and complete transcript of the record and all proceedings in said court, in cause No. 1680, John T. Reynolds, Plaintiff in error, versus William M. Fewel, Defendant in error, as the same remain on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said Court, at Oklahoma City, this 8th day of January, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 23,511. Oklahoma Supreme Court. Term No. 433. John T. Reynolds, plaintiff in error, vs. William M. Fewell. Filed January 18, 1913. File No. 23,511.

CONTENTS AND CITATIONS.

CONTENTS AND CITATIONS—CONTINUED.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1913.

No. 433.

JOHN T. REYNOLDS, - - - *Plaintiff in Error,*

vs.

WILLIAM M. FEWELL, - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

ABSTRACT, BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

Statement of Plaintiff in Error.

The defendant in error, who was plaintiff below —and this shall be the designation given him in this statement and argument—brought an action of ejectment against plaintiff in error—whom we shall designate by the same name in this argument—November 10, 1905, in the United States Court for the Western District of the Indian Territory, to recover the possession of 160 acres of land claimed by

him under an agricultural contract for the term of five years beginning September 7, 1905, and as ground therefor alleges these facts:

Minnie Solander was a duly enrolled citizen of the Creek Nation and entitled to 160 acres of land in the division of the Creek lands among its citizens; that she and said George Solander were husband and wife; that there was born to them, in 1899, a daughter, Hattie, who was also an enrolled member of said tribe and entitled to have and receive a like allotment of lands in said division. October 8, 1899, said Minnie died intestate, leaving surviving as her heirs at law her said husband and child. November 17, 1899, the child died, leaving surviving as her only heir, George Solander, who thereby became, by *ascent,* the owner in fee of the allotment which his said daughter was entitled to have and receive out of the lands of the said tribe of Indians.

May 5th, 1903, an allotment deed was issued to the heirs of said Hattie Solander, without other description, for the 160 acres of land in controversy.

September 7th, 1905, the father made and delivered to plaintiff the lease aforesaid, which was duly recorded in the office of recorder of deeds of the district in which said land was situated. It is alleged that defendant and one Hollingsworth were in the unlawful possession of the land. Hollingsworth filed a disclaimer and the action was dis-

missed as to him. Damages in the sum of $500.00 were asked, and for possession.

Answer of defendant Reynolds denied the ownership of a leasehold, and right of possession, as alleged; admits the enrollment of said mother and child; that they died as alleged; that deed of allotment was made and delivered as alleged; denied the right of succession of George Solander to the land in question, because he was a white man, a non-citizen of said Creek Nation—an alien—and could not inherit or take any right or title in and to said land, or interest therein.

Defendant avers that he is in the lawful and peaceable possession of said 160 acres of land by virtue of a warranty deed, title bond and agricultural contract made and delivered to him by Phoebe Trusler, being the sister of said Minnie, and said Hattie being her niece and the daughter of Minnie. That under the laws of descent and distribution of the Creek Nation of Indians, prior to, and at the time of the death of said child Hattie, the said Phoebe Trusler was the sole heir of said child, upon her death, being her nearest relation by blood of said tribe of Indians. Denies unlawful possession at any time of said lands, or wrongful detention of the same; that plaintiff had full knowledge of defendant's rights and possession when he, the plaintiff, took his said agricultural rental contract from George Solander, and that defendant's said several

conveyances were then of record in the office of register of deeds in the recording district where said land was situate. Denies damages to plaintiff of $500.00, or any sum.

By leave of court, December 22, 1908, defendant amended his answer, alleging actual occupation of the land in question, since 1904, claiming title thereto in fee simple under warranty deed, as aforesaid, from Phoebe Trusler, as set forth in the 16th paragraph of the agreed statement of facts filed herein, and has made permanent and valuable improvements which have enhanced the market value of said land $2,913, and asks that that sum be allowed him, less the reasonable rental value of the land for the years 1906, 1907 and 1908, as provided by the statute in such cases.

May 25, 1909, cause tried, jury waived, and agreed that cause be tried to the court upon the pleadings and the following:

STATEMENT of FACTS

1. Minnie Solander was an enrolled citizen of the Creek Tribe of Indians, and entitled to 160 acres of its lands.

2. She was married to George Solander August 27, 1898; a child was born named Hattie.

3. Minnie died intestate, October 8, 1899, leaving her said daughter and husband surviving, and one sister, Phoebe Trusler.

4. December 3, 1901, the heirs of Minnie filed upon 160 acres of said Indian lands, and upon same day an allotment certificate was issued to said heirs.

5. May 5, 1903, allotment deeds were issued to the heirs of said Minnie.

6. Hattie was born February 22, 1899; was enrolled as a Creek citizen, and thereby became entitled to have and receive 160 acres as her allotment out of the public lands of said nation of Indians.

7. November 17, 1899, Hattie died, leaving her said father, and her aunt, Phoebe (her mother's sister), her nearest relation of Creek blood.

8. December 4, 1901, the heirs of Hattie selected an filed upon, as her allotment of the lands of said nation, the southeast quarter of section 30, township 19 north, range 13 east, in what was the Creek Nation, in the Indian Territory (and the land

in question). On same date an allotment certificate was issued to the heirs of said Hattie.

9. May 5, 1903, allotment deeds were issued to the heirs of said Hattie.

10. Said George Solander was not a citizen of said nation, enrolled, but lived and resided in the Creek Nation in the Indian Territory on the dates of the deaths of his wife and child, and had lived therein for a number of years before their death, but did not live with them or support them at the time of their death, and for several months prior thereto.

11. He is a native of the United States, not of Indian blood, and was such citizen at the time of the deaths of his wife and child.

12. Phoebe Trusler, sister and aunt of said wife and child, respectively, was a duly enrolled citizen of said nation, of mixed-blood, and lived and resided in the said nation at their respective deaths, and was their relative by Indian blood.

13. That defendant and said Hollingsworth are in possession of said land.

14. The said lease was executed as alleged in said complaint.

15. George Solander did not select the allotments, as herein alleged.

16. Defendant held possession by virtue of the lease, bond for deed, and warranty deed, all made by Phoebe Trusler to defendant, all of which had been duly recorded.

17. The Arkansas law of descent and distribution on December 4th and 5th, 1901, and May 5th, 1903, is set out in chapter 48 of Mansfield's Digest. The only statutes of descent and distribution in the Creek Nation, prior to and on the dates above mentioned, are as follows:

> "*Sec. 6.* Be it further enacted, that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons; and in all cases where there are no children, the nearest relation shall inherit the property." (Laws of Muscogee Nation, 1889, p. 60.)
>
> "*Sec. 8.* The lawful or acknowledged wife of a deceased husband shall be entitled to one-half the estate, if there are no other heirs; if there should be other heirs, in all cases where there is no will, the husband surviving shall inherit of a deceased wife in like manner." (Laws of Muscogee Nation, 1880, p. 60.)
>
> "*Sec. 1.* All non-citizens, not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have the right to live in this nation and enjoy all the privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands." (Laws of the Muscogee Nation, 1890, p. 60.)

18. If this cause be decided for plaintiff, defendant will pay to plaintiff whatever sum—as rent—as may be agreed upon or shown to be reasonable.

19. Cause may be submitted on oral or written argument, or both, without a jury, and nothing herein contained shall affect the right of appeal.

The oral proof appearing in the record was upon the question of betterments, upon which no error has been assigned in this court, and is not in issue.

May 25th, 1909, the court found that upon the death of Hattie Solander she was the owner of the land in dispute, and it then vested in her father, and that Phoebe Trusler had no title or interest in same. Judgment for plaintiff against defendant for possession of land and for costs, to which defendant excepts.

Motion for new trial on the grounds that judgment is against the evidence; contrary to law; and for error of law at the trial, and excepted to by defendant.

Motion overruled and exception by defendant. Appeal prayed, allowed, and order providing for "case-made" and for bond.

The usual proceedings of "case-made" follow, and cause heard by Supreme Court of Oklahoma. Opinion of court filed March 19, 1912, affirming the judgment of the trial court.

Petition for re-hearing filed April 3, 1912.

Petition for re-hearing overruled June 4, 1912.

Proceedings in error to the Supreme Court of State of Oklahoma.

Certificate of Clerk of Supreme Court of State of Oklahoma authenticating record of cause in that court.

ASSIGNMENT OF ERROR ON WRIT OF ERROR TO SUPREME COURT OF STATE.

There is but one specific assignment of error in this case, being in substance as follows:

Error in holding and adjudging under the pleadings, agreed facts, and laws of the United States relating to the allotment in severalty among the enrolled members of the Creek tribe of Indians, that the public lands of said tribe, under the provisions of the Act of Congress entitled "An Act to Ratify and Confirm an Agreement With the Muscogee or Creek Tribe of Indians" (31 S. L. 861), and particularly set forth in section 28 thereof, that defendant in error had and held the legal right to the immediate possession of the 160 acres of land in controversy by virtue of an agricultural lease for a term of five years executed by the father, a non-citizen of said tribe, of deceased member of said

tribe, enrolled and entitled to an allotment of 160 acres of land out of the said public lands, but who died before receiving her allotment, and afterward allotted to the heirs of said deceased child, without other description of persons, said father claiming to be the sole heir of said child, as against the actual possession of plaintiff in error under deed from a maternal aunt of said child, being her nearest relation of the blood of said tribe, as set forth and admitted by the agreed facts of the case, and the undisputed facts otherwise contained in the record.

The second error of the court below was its refusal to reverse the judgment of the trial court in adjudging that defendant in error was the lessee of sole heir, and entitled to said allotment, and under the statute and laws of the United States was entitled to have and to hold said land.

BRIEF *and* ARGUMENT

Wherefore, the only question presented for consideration and determination, is, whether or not a non-citizen of the Creek tribe of Indians, father of a citizen and enrolled member of that tribe, entitled to have and receive out of the public lands of that tribe 160 acres, as provided by the Acts of Congress of the United States for such allotment, is an heir of such child, who died before receiving her allotment of said lands, and the person named as heir under the said deed of allotment, and thereby the absolute owner in fee and entitled to the immediate possession of said land as against plaintiff in error.

We are not aware that this identical question has yet been passed upon by this honorable court in a case of allotment of lands of the Creek Nation of Indians in the Indian Territory, but assuming that the Acts of Congress relating to allotments of the tribal lands and titles of the several Five Civilized Tribes of the late Indian Territory, as well as their tribal laws, are substantially alike, and where this court has had occasion to discuss and consider a like question its expressions therein would be, to some extent at least, a guide or aid in the determination of the case at bar.

Therefore, we hereby give, as briefly as we can, in substance, the views of the court in "*The Cherokee Intermarried Cases,* 203 U. S. 76-96.":

Prior to 1855 certain white persons had married Cherokees, which caused a serious question as to the status of these persons and the jurisdiction of the nation over them. The Acts of Congress of June 30, 1834, carried into sections 2134, 2135, 2147 and 2148, Revised Statutes, prohibited a citizen of the United States from going into the Indian country without a passport, and they might be removed therefrom as intruders. The council had laws to permit certain white persons to reside in the nation, subject to its laws, though free from the laws relating to intruders.

The Cherokee Act of 1855, "Regulating Intermarriage of White Men," gave the nation jurisdiction over all persons privileged to reside therein, but contains nothing showing an intention to confer property rights on the intermarried. But, in respect to the *public domain*, the Court of Claims, in the present case (*"Cherokee Intermarriage Cases,"* 203 U. S. 821), because of *Journeycake's* case, 155 U. S. 196, assumed that the acquisition of citizenship under Cherokee laws carried the right to share therein, unless forbidden by legislation.

The council, in 1874, adopted a new code, providing that an intermarried person might share in the right of soil or vested funds upon payment into the treasury money equal to the pro rata share of each native Cherokee in the lands and vested wealth of the nation, estimated at $500.00, which made

them entitled to all the rights of a Cherokee, which remained the law, notwithstanding the law was omitted from certain compilations of the Cherokee laws of 1880 and 1892. But, says the court:

> "We agree that this omission did not operate to change the existing law, as the acts providing for the compilation did not provide that they should be laws affecting the nation, and where an error was committed by a compiler, the original, as duly passed and approved, must prevail."

The words were left out by the Act of November 28, 1877, after the words, "this nation," in the second line, and the proviso was made to read:

> "Provided, also, that the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of the nation."

Thus this right of paying $500.00 for complete citizenship existed only from November 1, 1875, to November 28, 1877, "assuming," as the court says, the power of the council to grant such rights under the Constitution of 1839, and the amendment in 1866.

The rights of Delawares and Shawnees to participation in the property distribution was under a specific convention approved by the United States, and the right of the freedman to share in the tribal lands and funds was by the Treaty of 1866, the result of the civil war, and the constitutional amendments thereupon adopted.

The court, quoting from the opinion of the lower court—Court of Claims—says:

> "The United States *dictated* the amendments to the constitution of this nation, by which their former slaves were made their political equals, and their common property to be shared with servants and defendants, was, in effect, *a revolution.* Among the Cherokees, citizenship and communal ownership were distinct things. One citizen might receive his annuity from the communal fund, and the one who never did, nor thought of receiving, 'was a *concrete* object lesson in constitutional law'."

Many special laws of the Cherokees show that they were intended, in effect, to give the adopted whites only *civil* and *political* rights, without any rights to the tribal lands or funds.

The intermarried whites show no grant of *equal* rights as members of the Cherokee Nation by treaty or otherwise. The Delawares, Shawnees and freedmen get their property rights by the *express* terms of the treaty, but the intermarried whites cannot point to any such provision of law in their favor.

> "It cannot be supposed for a moment that Congress intended by this legislation to take away from the Cherokee people property which was constitutionally theirs, or to confer on white citizens property they were not legally entitled to have. The term, 'citizens,' in these statutes of the United States, must be construed to mean those citizens who were constitutionally or legally entitled to share in the allotment of lands."

It is assumed that the court takes judicial notice of the laws, especially published laws of the several tribes of Indians of the late Indian Territory, and while the agreed facts (Printed Record, p. 3) set forth but three sections of the acts of the Creek National Council, namely:

(17) "That the *only* statutes in relation to descent and distribution in the Creek Nation prior to, at, and on all the dates above mentioned, are as follows:

> '*Section 6.* Be it further enacted that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons, and in all cases where there are no children, the nearest relation shall inherit the property.'
>
> '*Section 8.* The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no heirs, and an heir's part if there should be other heirs in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner.'
>
> '*Section 1.* All non-citizens not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have the right to live in this nation and enjoy all privileges enjoyed by other citizens, except in participation in the annuities and final distribution in the lands'."

It is further assumed, and, we trust, not with violence, that the court is not to be limited in its in-

formation of the law upon the subject in hand, to that which is stipulated by the parties to be the only law upon the subject. The case last above cited, decided in 1905, should be sufficient authority for this assumption. Moreover, in 1893 the Court of Appeals of the Eighth Circuit, in a case from the United States Court of Indian Territory, in the well considered case of *Davison* v. *Gibson,* 5 C. C. A. 543, and which became noted in that jurisdiction, announced the proposition:

> "The court, in making up its opinion of the law of the case, is not limited in its researches to legal literature. It may consult works on collateral sciences or arts or history touching the topic on trial, and may appeal to the public archives for this purpose. Whart. Ev., Secs. 282, 336; *Brown* v. *Piper,* 91 U. S. 42; *U. S.* v. *Teschneaker,* 22 How. 392; *Kirby* v. *Lewis,* 39 Fed. 570."

And this was a case in which no Creek law could be produced, or it was not produced. The trial court, in the absence of local law, applied the rule of the common law, which view was not adopted by the Court of Appeals, but formulated one that seems sensible and just:

> "If, therefore, the court had no means of ascertaining what the law or custom of the Creek Nation was on this subject, it should have applied the law of the forum. That law is found in chapter 104 of Mansfield's Digest, put in force in the Indian Territory by Act of Congress approved May 2, 1890 (26 Stat. 94,

> c. 182, Sec. 31). * * * It would undoubtedly be more rational to presume that the law or custom of the nation on this subject was in harmony with the statute adopted by Congress, and that the Act of Congress was merely declaratory of the previously existing law, than to presume that the English common law, a system utterly at variance with the known habits and customs of Indians, was in force there."

It seems strange that no law of the Creek Nation could be found applicable, for a publication of all the laws of the Creek Nation had been compiled and published by the nation in 1890, known as "Perryman's Compilation."

It is now well known as a matter of public law, declared by Act of Congress in 1898, known as the Curtis Act (30 Stat. 495), that all the courts and laws of the said five tribes were abrogated and their tribal courts abolished, and the records and archives of those nations taken possession of by the general government and placed with the Dawes Commission.

It is a matter of common knowledge that the Creeks had laws of descent and distribution, perhaps somewhat limited, ambiguous and conflicting; but there could not well have been any misunderstanding as to the status of the non-citizen white man in that nation long prior to the Acts of Congress providing for the dissolution of the tribal government and the allotment of the tribal lands. Their two volumes of compiled laws—Perryman's,

in 1890, and McKellop's, in 1893—teem with restrictions upon the rights and privileges of the non-citizen white man. We venture the statement that not ten white men were admitted to citizenship or appeared upon the rolls of the Creek Nation. No other Indian tribe sought more rigorously to bar him from rights in their tribal property, and among its last expression in that regard was an act of the National Council approved October 26, 1889, in the following words:

> "*Section 299.* No non-citizen shall, on account of marriage with a citizen of this nation, acquire any right pertaining or belonging to a citizen of this nation."
>
> "*Section 300.* No non-citizen shall have the right to reside in or to own any improvements in this nation, except as provided for in the treaties between this nation and the United States." (Approved October, 1892.)
>
> McKellop's Compilation, Chap. 22, p. 106.

It is manifest from this record, by agreement of parties, that the Creek Nation had a law of descent and distribution at the deaths of the would-be allottees, said mother and daughter, in October and December, 1899.

This is corroborated by a subsequent agreement, more solemn and deliberate, that of the United States and the Creek Nation, evidenced by an Act of Congress approved March 1, 1901, and ratified by the Creek Nation May 25, 1901, wherein it was recited in the second clause of section 28:

"All citizens who were living on the first day of April, 1899, entitled to be enrolled under section twenty-one of the Act of Congress approved June 28, 1898, entitled 'An Act for the Protection of the People of the Indian Territory, and for Other Purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before he receives his allotment of lands and distributive share of all the funds of the tribe, *the land and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.*"

It is plain that there was no Creek law of descent and distribution at the time of the making of this so-called "Creek Original Agreement of 1901," for, as hereinbefore stated, the "Curtis Act of 1898" repealed and abrogated all Creek laws and abolished its tribal courts, and the only construction that can be given the act for *descent* of the would-be allotments of enrolled Creek citizens who should die before receiving their allotments, would be to treat it as an act of revivor of the former Creek law of descent and distribution, and without giving any of the terms of that act, it was left to the courts to find in the archives of the Creeks, in the vaults of the Dawes Commission, or in such of its printed published laws as were recognized in the Indian Territory; or if past finding out, then to

adopt the rule prescribed by the Circuit Court of Appeals in *Davison* v. *Gibson, supra:*

> "Apply the law of the forum found in Mansfield's Digest, put in force in the Indian Territory by Act of Congress approved May 2, 1890—it being more rational to presume that the law or custom of the nation on this subject was in harmony with the statute adopted by Congress, and that the Act of Congress was merely declaratory of the previously existing law, than to presume that the English common law, a system utterly at variance with the known habits and customs of Indians, was in force there."

It has been so made to appear by section 6 of the Act of Congress adopted June 30, 1902, commonly called the "Creek Supplemental Agreement":

> "Provided that only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation; and provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

It may be taken for granted in observing the action of the United States and the Creek Indians as to the two agreements aforesaid, and in view of the Act of Congress of May 27, 1902, repealing the provision of section 28 of the Act of March 1, 1901, providing for the disposition by *descent* of the *right* of allotment not consummated by selection or re-

ceipt of same by the Creek enrolled citizen during his lifetime, should *descend* to the heirs of such decedent, that both parties intended to exclude from inheritance, grant, or otherwise, the non-citizen from participation in a share of the tribal lands and tribal funds. It is further manifest, from this Act of May 27th, that the United States was not satisfied as to the sufficiency or clearness of expression of this Creek law of descent—this revived, resurrected law —and to put the matter beyond the peradventure of doubt expressly provided for such *descent* under the adopted Arkansas law of descent, then prevailing in the territory as to all persons and property.

Less than a month after the passage of this Act of May 27, and before it was to take effect on July 1, 1902, under the joint resolution of Congress, the Act of Congress "to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes," was adopted June 30, 1902, the opening words of the preamble being:

> "That the following Supplemental Agreement, *submitted by certain Commissioners of the Creek Tribe of Indians*, as herein amended, is hereby ratified and confirmed on the part of the United States, and the same shall be in full force and effect if ratified by the Creek Tribal Council on or before the first day of September, 1902."

The same was promptly ratified by the Creek Council within a month and the President's proclamation gave it the finishing touch August 8, 1902.

It is significant that these several acts and proceedings were in such rapid succession, and more significant that the supplement to the original agreement should have been inaugurated by the Commissioners of the Creek Tribe of Indians, and that the most prominent feature of it being section 6, which sought to put to rest all doubt as to how these lapsed allotments should be disposed of. It is apparent the Indian had learned some of the white man's ways of providing by will, or making simple laws for passing property by descent, but he had been unable to frame a law for clearly excluding the non-citizen, and there appears enough legislation scattered through a series of years—Indian legislation—to show that the intent and purpose of the Indian was to prevent the crafty white man from getting absolute title to and possession of his land, and the evidence is ample and of long standing that the general government was as much in favor of protecting the Indian from such rapacity and greed, and no more positive proof of it than the zeal shown in so framing these several agreements as to at last bar the non-citizen from in any manner getting a share or interest in the tribal funds and tribal lands. It is quite clear, however, from all the circumstances, that the general government did not favor the Indian laws of descent of property, or as to any other of his laws, for by arbitrary enactment of one brief paragraph it abrogated all the laws of the Five Civilized Tribes, and in another abolished their tribal

courts, and adopted a uniform law of descent for all people of the Indian Territory. It so remained from 1898 until it came to making the Creek Agreement of March 1, 1901, and therein provide for the allotment of the Creek public lands among the members and citizens of the Creek Tribe, and when it was found necessary to therein make a provision for the disposition of a lapsed allotment it was evidently the policy and intent of both parties that the public lands of the Creeks should be allotted to citizens of the Creek Nation. This was the natural course of devolution, and as well the just and legal course, as has frequently been decided in a number of cases, prominent among them the *Journeycake* case and the *Cherokee Intermarried* case. A provision was made for the *special cases*, or contingencies that would in all probability arise where a member and citizen of the tribe should die before receiving his share of land, and to meet it, as was to be expected, from every point of view, would be insisted by the Creek Commissioners who appeared and acted for the nation that this sort of allotment should descend according to the Creek law of descent—to the Creek citizen heirs of the person entitled to allotment in the first instance. It is to be assumed that the agreeing parties were as fully cognizant of these same laws of descent as were the parties to this action when they stipulated that sections 6, 8 and 1 were the Creek laws of descent; that is to say, they were the Creek laws of descent before abroga-

tion by the "Curtis Act" of 1898, and which were necessarily revived by this act and agreement of 1901, only for the special purpose aforesaid. The apparent change of view by the United States in attempting to repeal the provision by the Act of May 27, 1902, is beyond the scope of discussion, for it did not live to be born. The Act of June 30, 1902—the Supplemental Agreement—may be taken as amounting to a repeal of the Creek law of descent and providing a new law of descent, or, in effect, reviving the adopted Arkansas law of descent; or, more accurately stating, leaving the Act of Congress of 1890 providing for descent and distribution of property in the Indian Territory. The adoption of this law by solemn Act of Congress made it as much a law of the United States as the adoption of a foundling by decree of court makes it for all purposes of inheritance the same as the natural child.

We insist that these acts are as one act—to be construed as one. The design and intent to provide a course of descent—succession—for an allotment inchoate and to so provide against its deflection from its natural and legal course—that is, in the channel of the Creek blood, as long as there should be such blood, and to express this intent more explicitly, both parties made their original purpose and intent by the express and positive language contained in section 6 of the Supplemental Act of June 30, 1902.

Taking the said sections 6 and 8 of the Creek law of descent literally, as have the state courts, and of course followed and will be urged by plaintiff, it is easy to decide in favor of plaintiff on this matter of disputed descent, and under a well understood rule of construction that a law must be enforced by the courts as it reads. Yet it is equally as well understood that there are exceptions to this rule as strong as the rule itself.

This court has said that the words of a statute are not to be taken literally when it would lead to inconsistency, absurd consequences and injustice. The reason of the law in such case should prevail over its letter.

U. S. v. *Kirby*, 7 Wall. 482.

In *Hanger* v. *Abbott*, 6 Wall. 532, plaintiff in error was defendant below in an action of *assumpsit*. The plea was three years' statute of limitations of Arkansas. Replication that defendant was a resident of Arkansas and plaintiff was a resident of New Hampshire; that the three years had not run before Arkansas joined the rebellion whereby the federal courts were suspended in that state barring plaintiff from bringing his action. Demurrer to replication, which was overruled and judgment for plaintiff. Judgment affirmed by the Supreme Court of the United States upon the ground that, while no exception was expressed in the statute suspending its operation in case of the closing of the federal courts by the rebellion, saying:

"Exceptions not mentioned in the statutes sometimes have been admitted, and this court has held that the time which has elapsed while certain prior proceedings were suspended by appeal should be deducted as it appeared the injured party had no right in the meantime to demand his money and therefore his right of action had not accrued. *Montgomery* v. *Hermandy*, 12 Wheat. 129."

Section 2 of the ordinance of 1787 provided:

"That the estates of both resident and non-resident proprietors, dying intestate, shall descend to and be distributed among their children, and the descendants of a deceased child, a grandchild to take the share of their deceased parent in equal parts among them; and when there shall be no children, or descendants, then in equal parts to the next of kin in equal degrees, among collaterals, the children of a deceased brother or sister of the intestate shall have in equal parts among them the deceased parent's share, and there shall in no case be a distinction between kindred of the whole and half-blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law, relative to descent and dower, shall remain in full force and effect until altered by the legislature of the district."

A non-citizen and alien claimed the right of inheritance under this law of descent of real estate, situate in that part of the Northwest Territory which is now the State of Michigan. The case went to the Supreme Court of Michigan as *Crane* v. *Reeder*, 21

Mich. 24, 4 Am. Rep. 480. CAMPBELL, J., delivered the opinion of the court, in part as follows:

> "It is claimed, however, under the ordinance of 1787 the intention existed to do away, in rules of inheritance, all questions of alienage, and that the policy of the government has always been to put aliens upon as good footing as citizens. But we have not been able to trace any such intention in the action of the United States. There has always been a policy aiming at inducing aliens to become citizens, but none which would render it indifferent to them whether they became citizens or not. On the contrary, there are no courts in this country which have enforced the disabilities of aliens who do not seek citizenship more uniformly than the courts of the United States. And the laws and treaties speak the same langauage.
>
> "*The only color for claiming such a construction for the words of the ordinance is because it does not say, when declaring the rules of descent, that the relatives must be citizens of the United States, and because it applies the same rules to the estates of 'resident and non-resident proprietors.' But probably there are very few statutes which undertake to mention specifically the citizenship of those who are to be affected by them. It is implied in all statutes that they shall be read in accordance with the recognized rules of interpretation and apply to such persons and things as fall naturally within their scope.* It is not customary in such acts to express such disabilities as should be implied and alienage has been recognized in all common law countries, and in most of not all other countries, as a disqualification to hold land in fee. Citizenship gave the same right to resi-

> dents and non-residents and the law did not require aliens to be included to satisfy its terms."

The court held the alien claimant could not inherit.

Another well-considered case, by the Supreme Court of Alabama, holds in the same line in *Donovan* v. *Pitcher,* 53 Ala. 411, 25 Am. Rep. 634.

In 1832 the legislature of that state passed an act prohibiting a free man of color from becoming a resident therein, and further provided that if he came into the state and remained thirty days he was guilty of felony and should be punished by imprisonment in the penitentiary. William Pitcher, who had been a slave there, had, by permission of his master, become the owner in fee of real estate therein and had improved it. He was afterward given his freedom and moved to the State of Ohio in 1857, and died there, leaving a widow and children. The plaintiff in error, Donovan, purchased the land of the former owner, and went into actual possession. The heirs of Pitcher brought ejectment and recovered judgment in the court below, the instruction to the jury being:

> "That if the jury believe that William Pitcher was free at his death, the plaintiffs were entitled to the land by descent, notwithstanding they were free persons of color resident in Ohio; and if William went to Ohio with the assent of his master to live as a freeman, he became a freeman entitled to buy, own and inherit land."

The judgment of the trial court was reversed on the ground that the Act of 1832 by implication barred him from inheriting land in Alabama, because he could not take possession of it—he was barred from entering the state at the time of his decease which was equivalent to a prohibition against receiving real estate. And while the heirs of William might inherit land from him in Ohio, yet the doctrine of state comity would not be recognized when to do so would violate the public policy of Alabama and this policy was not within the inhibition of the Constitution of the United States, as the right or privilege of inheritance was a matter of state control solely, saying:

> "The extension of comity in the violation of law and policy of the state would be the abdication of the law and sovereignty of the state, and the recognition of the superiority of and not the equality of the foreign state. Every state judges for itself, of the nature, extent and utility of the recognition of foreign laws, respecting the state and condition of persons, and is not bound to recognize them when prejudicial to their own interests" (citing Story on Conflict of Laws, Sec. 36).

The spirit as well as the letter of the statute must be respected, and *where the whole context of the law demonstrates a particular intent to effect a certain object, implication may be used to aid the intent.*

Durousseau v. *U. S.*, 6 Cranch. 307;
In re Ellis, 11 Cal. 222.

"A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter of the statute; and the thing which is within the letter is not within the statute unless it be within the meaning of the statute."

Suckley v. *Furse*, 15 Johns. 338;

People v. *Utica Ins. Co.*, 15 Johns. 357.

The case of *deGraffenried* v. *The Iowa Land & Trust Company et al.*, 20 Okla. 711, in which this Creek law of descent was construed, in 1908, and has since been followed in the State of Oklahom, was submitted upon an agreed statement of fact, which included an agreed statement of the law, for all that part of the statement which purported to give the Creek law of descent did not rise to the dignity of fact, but was merely the law of the case of which the court is presumed to have been fully advised. That which we have furnished from the Creek Statutes has been for the convenience of the court, and we believe the state of the case now presented is much more favorable to our contention than was the case just named, to the defendants therein. We have aimed to show the court how the Creek people, through their agreements of 1901 and 1902, intended and understood the tribal funds and tribal lands in the case of death and intestacy of an allottee should descend.

The decision in the *deGraffenried* case cannot be taken to have made an absolute rule of property

in said state because it is but the first decision, and further, it does not construe and determine the application of a *state* statute of the devolution of real property, but is the construction of a statute of the United States fixing the descent of property at the time of the descent within the jurisdiction exclusively of the courts of the United States, and which is yet left open for final determination by the highest court of the land. In other words, the question is federal instead of state. There is not any positive law or rule of comity requiring the court to follow the Supreme Court of Oklahoma in construing United States statutes.

We are aware of the high regard of the courts for the doctrine of *stare decisis,* but it is not absolute. The Supreme Court of Minnesota, in *Grimes* v. *Byrne,* 2 Minn. 80, says in regard to it:

> "No adjudicated case can be authority for another unless the facts in both cases are identical. The positive authority for a decision is co-extensive with the facts upon which it was made."

Mere precedent alone is not sufficient to establish a principle which is not founded on sound reason, and does not tend to the purposes of justice.

Leavitt v. *Morrow,* 6 Ohio St. 71, 67 Am. Dec., with notes, 334.

A question not settled by positive legislation will not be considered settled by a single decision.

Smith v. *Smith,* 13 La. 441;

State v. *Williams,* 13 S. C. 546.

A decision by a state court as to the construction of an Act of Congress governing mining claims should not be followed if it is wrong, under the doctrine of *stare decisis,* or on the ground that it has become a settled rule of policy, when the construction of the statute has not been settled by the Supreme Court of the United States.

Calhoun Gold M. Co. v. *Ajax Gold M. Co.,*
27 Colo. 1, 50 L. R. A. 209.

It is not a violent assertion to make that Congress must have seen difficulties in the way of disposing of the lands that should fail to descend to those enrolled members of the tribe entitled to receive allotments, but who died before receiving them, under the abbreviated and indefinite language of section 28 of the Original Agreement. The first query to naturally arise would be: What is the Creek law of descent? Who are heirs under that law? We venture to further assert that it was a matter of common knowledge in the Creek Nation shortly after that act became effective that many alienations were made, and have continued to be made, by non citizen surviving husbands of deceased wives, of allotments that would have descended to the wife if she had lived to receive it. It was certainly the desire of such non-citizen that the construction of said section 6 of the Creek law should be literal. The non-citizen was, as a rule, a white man. The white men were largely in the ascendency in the territory. Soon the United

States court of the district in which the said tribe was located handed down an opinion declaring that the non-citizen surviving husband inherited as though he were a citizen the lapsed allotment of his deceased wife under the literal language of sections 6 and 8, which opinion was printed and circulated throughout the Creek Nation. When statehood came, one of the early opinions of its Supreme Court, the noted case of *deGraffenried* v. *Iowa Land & Trust Co., supra,* followed the opinion of the United States District Court, and it has continued to so decide in all subsequent cases where the same point was raised, and it has been discussed as proper and expedient to announce it as a rule of property.

It is clear that the decisions of the U. S. District Court and of the State Supreme Court cannot be controlling in this case, for the reasons hereinbefore stated, upon the subject of *stare decisis.*

In all of the cases so far decided by the state courts of Oklahoma upon the question now under discussion, the said two sections of the Creek law of descent (6 and 8) have, without hesitation, been taken literally, as standing alone, without regard to facts and circumstances; that these were and still are matters of common knowledge. While it was a matter of common knowledge with the Creek citizens that a non-citizen of the Creek Nation was incapacitated to have and receive any direct share, at least, in the allotment of the lands of the Creek Nation of Indians. The legislation of the Creek Council

bristled with acts of exclusion and restriction of their rights and privileges, and expressly so by its published books in common use in the nation. However, it had been a debatable question as to the status of the non-citizen very soon after the Act of Congress (the Original Agreement) went into effect. The noted case of *Eck Brook* came before the U. S. Court in that nation and was decided in favor of the non-citizen, Eck Brook, after a hard contest. And, subsequently, by the same court but by a different judge, the same question was decided against the right of the non-citizen to inherit or receive such an allotment—it being the said noted *deGraffenried* case. This case was appealed and after statehood found its way into the Supreme Court of Oklahoma under the Enabling Act, and was there argued by an array of able lawyers upon both sides, and a most elaborate opinion was delivered by that court, reversing the lower court and sustaining the contention of the non-citizen.

From this statement it must be conceded that the question now at the bar in this case has been and is a debatable question, and if so, to determine it is a matter of the construction of the law of descent prescribed in section 28 of the said Act of March 1, 1901.

This honorable court has announced a rule so terse and plain as to do away with many former rules of construction, in *Rodgers* v. *U. S.*, 185 U. S. 86, in this language:

"Whenever the intent of a law or agreement becomes a debatable question, and there is nothing on the face of the statute to clearly indicate such intent, then such minor and subsidiary rules by which courts are guided in determining the true construction, are applied."

And the court, in *Rodgers* v. *U. S., supra,* and *White* v. *U. S.,* 191 U. S. 545, have announced a like rule in these words, substantially:

"Where the intent is not plain from the statute, and the circumstances and conditions of its enactment do not make clear the intent of Congress, the court should resort to the rules of statutory construction."

The state of the origin of the law adopted for descent, by the Supplemental Agreement, that modified the one now under consideration, being the Act of Congress of June 30, 1902, had this law:

"The State of Arkansas provided that a married woman can convey her real estate, or any part thereof, by deed of conveyance, executed by herself and husband and acknowledged and certified in the manner prescribed."

Harrold v. *Myers,* 21 Ark. 592.

Held, that it was implied that the married woman must be an adult to make the conveyance absolute—that there was an implied exception in favor of infants and married women.

"A thing not within the intent and spirit of the statute is not within the statute, though within the letter."

Sec. 2, Sutherland on Statutes:

True, it is said, following:

> "But it must be a clear case when what is within the letter is excluded as not within the spirit and intent of the statute."

Citing, *State* v. *Insurance Co.*, 92 Tenn. 420.

We insist, from what has been expressed herein, that neither party to the "Original Agreement," nor Congress, intended that the non-citizen should have and receive the allotment in question under and by virtue of being the heir named in the certificate of allotment or deed of allotment, conveying title to the 160 acres in dispute.

We must assume that this court takes judicial cognizance of the published laws of said nation, that appear upon their face to have been published by authority of the nation; the first of which is a compilation by L. C. Perryman, published in 1890, and the other a compilation by A. P. McKellop, published in 1893, and purporting to be all the laws of the Nation then in force, and another published in 1900 and purporting to be all the acts and resolutions of the Council from 1893 to 1900, inclusive.

The Act of Congress approved June 30, 1898, abrogated all the laws of the Creek Nation, to take effect July 1, 1898, but leaving the tribal courts in existence until Oct. 1, 1898, with power in that nation to pass such laws as were necessary to the winding up of its tribal affairs and subject to the approval of the President of the United States.

The necessary conclusion from this condition of affairs is that there were no *Creek laws* of descent and distribution, subsequent to said date of abrogation, except as may have been revived by express enactment of Congress, and this was done by the Act of March 1, 1901, ratified by a vote of the Creek National Council, May 25, 1901, and constitutes what is commonly known as "The Original Agreement," this being, if possible, more solemn than an ordinary Act of Congress, because it had received the endorsement of the Creek people, through their legislature, the National Council.

The provision for consideration in this cause is the following:

> "*Sec. 28.* All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section 21 of the Curtis Bill, shall be placed upon the rolls to be made by said Commission and under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of land, and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

It was held by the United States Court of Appeals of the Indian Territory in *Nevins* v. *Nevins*, 4 Ind. Terry. Rep. 475, that the abrogation of the tribal courts and the laws of the Nation left the law

of descent of Arkansas as adopted the only law of descent therein, and it follows that this provision reviving the Creek law of descent was the only other law in force upon the subject, and in no wise repealed the existing law further than was necessary to dispose of the unallotted share of land of a deceased enrolled member of the tribe, and his share of the tribal funds; any other property of a Creek citizen would descend under the general law of descent.

Such was the view taken by the Department of Justice in determining the course of descent of the "loyal Creek fund" in 1904, as shown by an able opinion of the Attorney General in Vol. 25, page 165, Atty. General Repts., in which it was held that the Creek law of descent was special. Referring to the Original Agreement of March 1, 1901, and Supplemental Agreement of June 30, 1902, the following language is used:

> "These Acts of Congress form part of a general *plan for the partition of the tribal lands and moneys*, and the provisions of said acts do not affect the disposition of the 'loyal Creek' fund, which is an individual asset of a limiated number of tribesmen,"

following the decision of the Court of Appeals of Indian Territory in case of *Nevins* v. *Nevins*, 4 Ind. Ter. 475 (65 S. W. 604; 76 *id.)*, which we have above cited.

We have experienced much difficulty in finding the printed and published acts of the Creek National Council, but have been able to get Perryman's and McKellop's Compilations, which we believe are the only printed published laws of the Creek Nation at all obtainable and have found it a most serious task to dig any other out of the Creek archives. The decisions of the Creek High Court are not known to have ever been printed, and can only be found in a somewhat crude condition, interlarded in journals and minute books of the court, and of very doubtful value in construing the laws of descent of the Creek Nation.

McKellop's Compilation, 1893,

Page 92, Chapter 14—*Wills and Administration.*

"*Sec. 258.* If any person claim to be the child of a deceased male person and it shall be proven that such person did not, during life, recognize the claimant as his offspring, then such claimant shall not be entitled to any share in the estate of the deceased." * * *

"*Sec. 260.* If any male person die without having made a will the judge of the district in which such deceased person resided shall grant letters of administration to any citizen of this nation, who may request it, and such person shall be required to give bond in double the value of such estate with at least two good sureties." * * *

"*Sec. 262.* The administrator shall at all times be required to make and provide liberal

means for the support and education of all the heirs of the deceased, to make any trade that may be of advantage to such estate, and to advise and direct the affairs of such heirs until they shall become of age, according to law, or until such heirs shall marry, in which event the administrator shall turn over to such heirs of his or her inheritance everything connected with the estate that may have been placed in his care, or its equivalent in money or other property." * * *

"*Sec. 265.* In the case of the death of a female, if there be a husband and children living, he shall have the preference of administratorship, and in the event of there being no children living the nearest relative shall have the preference."

"*Sec. 267.* The lawful or acknowledged wife of a deceased husband shall be entitled to one-half the estate if there are no children, and a child's part if there should be children, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner."

Laws in McKellop's Compilation Concerning Non-Citizens.

1st. Comp. 1893, p. 105.

"*Sec. 295.* All persons, native or otherwise, who may have heretofore been entitled to make application for citizenship and who have resided outside for 21 years, are declared aliens."

"Sec. *296.* The minor children and descendants of such persons likewise debarred."

"*Sec. 297.* All persons who have heretofore applied for citizenship in Cherokee, Choctaw, Chickasaw, or Seminole Nation are aliens." (Approved October 26, 1889.)

"*Sec. 299* (p. 106). No non-citizen shall on account of marriage with a citizen of this nation acquire any right pertaining or belonging to a citizen of this nation."

"*Sec. 300.* No citizen shall have the right to reside in or to own any improvement in this nation except as provided for in the treaties between this nation and the United States." (Approved October, 1892.)

"*Sec. 308* (p. 108). From and after the passage of this act, all marriages between *citizens,* who are now living together as man and wife, are hereby legalized." (Approved October 22, 1891.)

"*Article XV* (Treaty 1856, p. 194). So far as may be compatible with the Constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian Tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits, excepting, however, all white persons, with their property, who are not by adoption or otherwise members of the Creek or Seminole tribe; and all persons not being members of either tribe, found within their limits, shall be considered intruders and be removed and kept out of the same by the United States Agents for said tribes, respectively (assisted, if necessary, by the military), with the following ex-

ceptions, *viz:* Such individuals with their families, as may be in the employment of the government of the United States; all persons sojourning in the country or trading therein under license from the proper authority of the United States; and such persons as may be permitted by the Creeks or Seminoles, with the assent of the proper authorities of the United States, to reside within their respective limits without becoming members of either of said tribes."

SECOND COMPILATION, 1900.

"*Sec. 16* (p. 6). It shall be unlawful for any citizen of this nation to lease for a term of years any portion of the unoccupied domain to any non-citizen to be occupied or improved by the non-citizen at his own expense in consideration of his occupancy and use of said land for said term of years." (Approved November 6, 1893.)

"*Sec. 44* (p. 10). The Principal Chief of the Muskogee Nation is hereby authorized and directed to request the United States Indian Agent to prohibit all non-citizens from gathering and selling pecans from off the public domain." (Approved October 25, 1893).

"*Sec. 76* (p. 19). The courts of the nation shall have and exercise jurisdiction over all controversies arising out of or pertaining to property rights acquired in this nation and situated in the same, by non-citizens who have intermarried with citizens, and by reason of such marriage secured rights and privileges in this nation under which such property was acquired and accumulated by them. * * * And all per-

sons hereafter intermarrying with citizens of this nation shall thereby be deemed to consent that the courts of this nation exercise jurisdiction over all property rights and privileges that they acquire in this nation by virtue of said marriage."

"*Sec. 77.* All property brought into this nation by non-citizens in consequence of intermarriage of such non-citizens with citizens of this nation, shall likewise be under the jurisdiction of the courts of this nation." (Approved April 6, 1894.)

"*Sec. 108* (p. 26). No non-citizen shall be permitted to own houses or fences of any kind within the nation, or any interest therein, and any grant, purchase, lease or other conveyance of lands of the Muskogee Nation, or title or claim thereto given by any citizen or person claiming to be a citizen, contrary to section 2116 of the United States Intercourse laws, is hereby declared to be null, void and of no effect. * * *" (Approved October 30, 1894.)

"*Sec. 147* (p. 41). Whereas it has become notorious that by questionable and unjust methods and practices many non-citizens have heretofore been counted as citizens and participated in the per capita distribution of the public funds of the nation." * * *

"*Sec. 150* (p. 42). All persons of Creek blood and all adopted citizens of any blood who reside in the Creek Nation and whose citizenship is not questioned, are hereby entitled to participate in the coming per capita payment." (Approved May 17, 1895.)

"* * * (p. 43). May 30, 1895, the National Council passed an act creating a 'Citizenship Commission composed of five of the most competent citizens of the Nation' to settle the question of citizenship."

"*Sec. 223* (p. 64). From and after the passage of this act, no permit shall be issued to any non-citizen to reside within the Muskogee Nation for any purpose whatever, except those permitted as hereinafter provided." * * *

"*Sec. 227* (p. 65). The provisions of this act shall not apply to physicians, surgeons, licensed traders, teachers, preachers and missionaries." (Approved November 6, 1896.)

"*Sec. 117* (p. 49). No judge shall be allowed to employ a non-citizen as Clerk of his Court, and for a violation of this section he shall be subject to removal from office."

There appears in this record, and set forth in full in the abstract page 10, as paragraph 17 of the pretended agreed statement of facts:

"*Sec. 1.* All non-citizens not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have a right to live in this nation and enjoy all the privileges enjoyed by the citizens, except participation in the annuities and final participation in the lands." (Laws of Muskogee Nation, 1890, p. 60.)

The laws referred to are in Perryman's Compilation of 1890, which are prior to the Compilation of McKellop, which purport to contain all the laws

of the Creek Nation in force from 1893 to 1899, inclusive. The act providing for the compilation contains this language: "To compile and codify all the laws in force up to and including the acts of the Session of October, 1892." The publication of 1900 by McKellop, as shown by his preface, that the book is merely a reprint of the acts and resolutions as they appeared in pamphlet form in 1893 and 1896, with the acts and resolutions of 1897, '98 and '99 added thereto, and "the work was done by direction of P. Porter, Principal Chief of the Creek Nation."

While there is no express act or resolution repealing the laws set forth in Perryman's Compilation, yet we submit that the language of the act, which we have above quoted relating to this "Compilation and codification of all the laws in force up to and including the acts of the Session of October, 1892," impliedly makes the compilation of McKellop, the Creek law from October 15, 1892, to 1899, inclusive.

It will be observed that McKellop's compilation does not contain section 6 of Perryman's Compilation, and neither is it embraced in any admission or stipulation in this case, being in the words following:

> "*Sec. 6.* Be it further enacted, that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons, and in all cases where there are no children, the nearest relation shall inherit the property."

However, it appears to have been accepted by the Oklahoma court as the law in the consideration of the case of *deGraffenried* v. *Iowa Land & Trust Co.*, but it is to be observed, it was by the respective parties *agreed* to be the law in *that* case. Assuming that Perryman's and McKellop's Compilations embrace all the law of the Creek Nation, we invite the court's attention to the following from Perryman's Creek laws, on page 26, section 108:

> "No non-citizen shall be permitted to own houses or fences of any kind within the nation, or any interest therein; and any purchase, grant, lease or other conveyance of lands of the Muskogee nation, or title or claim thereto given by any citizen, or person claiming to be a citizen, contrary to section 2116 of the United States Intercourse laws, is hereby declared to be null, void, and of no effect." * * * (Approved April 6, 1884.)

These laws—statutes of the Creek Nation—should afford a complete support to the proposition of public policy fixing the status of non-citizens therein from the beginning of its published laws until the Original Agreement, and, that is, that he should be excluded from all share or interest by purchase or descent, in the tribal funds and participation in the division—partition—of the tribal lands.

The only case ever cited from the Creek Supreme Court, of which we have knowledge, is *Gibson* v. *Davidson et al.* (which came before that court upon appeal from the District Court), in which was

rendered a unique opinion as quoted by the Supreme Court of Oklahoma in *deGraffenried* v. *The Iowa Land & Trust Co., supra:*

> "The Supreme Court Room, October 28, 1893: The court, after careful examination and due consideration of the action of the judge on record relative to Edward Gibson, finds that he is not a *bona fide* citizen of the M. N. and simply entitled to his own property, and an heir's part in the Julia Gibson estate—therefore dismiss the case for want of jurisdiction of Edward Gibson."

Presumptively, because he was a non-citizen; therefore nothing was decided except want of jurisdiction, and what was said about his share in Julia Gibson's estate was *obiter dictum.*

Much that appears in the opinion of the court in *Cherokee Intermarriage Cases, supra,* we submit is applicable in the case at bar, which states:

> "That the term citizens in these statutes of the United States must be construed to mean those citizens who were constitutionally or legally to share in the allotment of the lands. * * * The doctrine is familiar that the language of a statute is to be interpreted in the light of the particular matter in hand and the object sought to be accomplished as manifested by other parts of the act, and the words used may be qualified by their surroundings and connections."

As before mentioned, Cherokees and Creeks, for unknown generations, have been adjoining neigh-

bors; have been allies in war, and allies with the whites in many of their wars, and the main noticeable difference appears in their laws concerning the rights of the white man among them, which were much more exclusive under the Creek law than under the Cherokee. The Creeks were much less disposed to affiliate, to intermarry with, and make citizens of the white than were the Cherokee, and the following language, in substance, contained in the last opinion above cited, is pertinent:

> "The laws and usages of the Cherokees, their earliest history, the fundamental principles of their national policy, their constitution and statutes all show that citizenship rested on blood or marriage; that the man who would assert citizenship must establish marriage; that when marriage ceased (with a special reservation in favor of widows or widowers) citizenship ceased; that when an intermarried white married a person who had no rights of Cherokee citizenship by blood, it was conclusive evidence that the tie which bound him to the Cherokee people was severed, and the very basis of his citizenship obliterated."

This is purely an action of ejectment, the plaintiff claiming the right of possession under a lease for five years, executed September 7, 1905, by one claiming title and the right to lease by virtue of a certificate of allotment and deed of conveyance wherein the only title or description of the grantee is "heirs of Hattie Solander, * * * being her appro-

priate share of the lands of the said Creek tribe of Indians." The defendant admits possession and denies that plaintiff's lessor was an heir, within the term heirs, of the class of persons described in said certificate and deed of allotment, as allottee or grantee.

If George Solander, non-citizen, shall take the 160 acres of land in dispute as an heir of his daughter, Hattie, he was barred from alienating it for five years from August 8, 1902, as provided in section 16 of the Supplemental Agreement, which became in force on that date, and is in the following language:

> "Lands allotted to citizens shall not in any manner whatever, or at any time, be incumbered, taken, or sold to satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior."

And, under the following section, 17, providing for leasing for agricultural purposes not to exceed five years, recites that such leases for a period longer than one year shall be void, without the approval of the Secretary of the Interior. This is an extension of the five-year period named in the Original Agreement, as held in *Tiger* v. *Western Investment Co.*, 221 U. S. 305.

There is no dispute of facts presented for consideration. The point is one of law, under the agreed statement of facts. The plaintiff is the actor and not entitled to a writ of possession until he has made his case. It is immaterial under the issue what right, title, or interest defendant may have or claim. The defendant, Reynolds, insists that errors charged by him in his assignment of errors should prevail and the judgments of the state courts be reversed, and for direction that judgment for defendant for costs be entered.

Respectfully submitted,

WILLIAM R. LAWRENCE,
Attorney for Plaintiff in Error.

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No. [redacted]. 102

In the

Supreme Court of the United States.

October Term, 1914.

JOHN T. REYNOLDS, - - - *Plaintiff in Error,*

vs.

WILLIAM M. FEWELL, - - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR DEFENDANT IN ERROR.

HENRY B. MARTIN,
JOSEPH C. STONE,
Attorneys for Defendant in Error.

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TABLE OF CASES.

LAWS AND TREATIES CITED FROM.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 433.

JOHN T. REYNOLDS, - - - *Plaintiff in Error,*

vs.

WILLIAM M. FEWELL, - - - *Defendant in Error.*

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and No. 434.

JOHN H. SHELLENBARGER, - *Plaintiff in Error,*

vs.

WILLIAM M. FEWELL, - - - *Defendant in Error.*

BRIEF *for* DEFENDANT *in* ERROR.

Statement.

The above styled and numbered cases involve an allotment in the Creek Nation made to the heirs of Minnie Solander, a Creek Indian, who died October 8, 1899, leaving her surviving as her only heirs George Solander, her husband, who is a non-citizen of the Creek Nation, but a citizen of the United States, and Hettie Solander, her daughter, who

was a citizen of said Creek Nation of Indians. Hettie Solander died about the 17th day of November, 1899, leaving her father, said George Solander, and also leaving an aunt, Phoebe Trusler, a citizen of the Creek Nation. The land was selected for and allotted to the heirs of Minnie Solander, deceased, on the 3rd day of December, 1901, under the provisions of Section 28 of the Supplemental Creek Agreement (33 Stat. L. 500). On the 7th day of September, 1905, said George Solander, claiming to be the heir and sole owner of said allotment, made an agricultural lease covering the same, and this is the instrument involved in the *Reynolds* case. On the 27th day of April, 1906, he executed a deed conveying the land, which conveyance is involved in the *Shellenbarger* case.

Since the defendant in error is the same in both cases and the same counsel represent the parties in the two cases, the facts are identical, and the law propositions the same, we have prepared and pray for leave to file in both cases one brief. The principal question involved is, Did George Solander, upon the foregoing facts, take said allotment under the Creek law which was in force from April 1, 1899, until July 1, 1902? If this question is answered in the affirmative, then the remaining question is, Were the lands alienable by said George Solander when said conveyances were made, the actions below by Fewell being in ejectment requiring him to recover upon the strength of his own title?

BRIEF *and* ARGUMENT.

Acts of Congress providing for Dissolution of Tribal Government, allotment of lands of the Creek Nation, and statutes governing descent of allotted lands.

Since March 1, 1889, the date of the establishment of a United States Court in the Indian Territory, Congress has enacted many laws for the purpose of allotting and distributing the lands and moneys of the Five Civilized Tribes to the respective members thereof, for the breaking up of the tribal relations, and to bring the Indians, as rapidly as was consistent with their welfare, upon the same plane as the white people, subjecting them, by a progressive series of acts, to the laws governing white people and their property, which acts taken as a whole show a new and progressive policy in dealing with the said tribes. The contentions upon behalf of plaintiff in error are not in accord with this progressive policy. By the act of May 2, 1890, the jurisdiction of the United States Court in the Indian Territory was enlarged, the act reserving, however, to the courts of the Five Tribes certain limited jurisdiction over cases arising wherein members of the tribes were the sole parties. The Act of Congress of March 1, 1895, still further enlarged the jurisdiction of the United States Court in the Indian Territory. The Act of Congress approved June 28, 1898 (30 Stat. L. 495), known as the orig-

inal Curtis Act, abolished all the tribal courts and tribal laws and subjected all citizens of the Five Civilized Tribes to the laws enacted by Congress for the Indian Territory and to the jurisdiction of the United States Courts in the Indian Territory. This act provided a scheme for the allotment of lands. It was the policy of Congress where it was possible to procure consent of the respective tribes to treaties providing for the allotment of their lands. In furtherance of this plan, in 1897, the Commission to the Five Civilized Tribes negotiated an agreement with the Creeks which was approved by Congress June 28, 1898, but which never became a law because it was not ratified by the Creek Nation. Section 1 of said Agreement which failed of ratification is as follows:

> "*1.* There shall be allotted out of the lands owned by the Muscogee or Creek Indians in the Indian Territory to each citizen of said nation one hundred and sixty acres of land. Each citizen shall have the right, so far as possible, to take his one hundred and sixty acres so as to include the improvements which belong to him, but such improvements shall not be estimated in the value fixed on his allotment, provided any citizen may take any land not already selected by another; but if such land, under actual cultivation, has on it any lawful improvements, he shall pay the owner of said improvements for same, the value to be fixed by the commission appraising the land. In the case of a minor child, allotment shall be selected for him by his father, mother, guardian, or the administrator having charge of his estate, pref-

erence being given in the order named, and shall not be sold during his minority. Allotments shall be selected for prisoners, convicts, and incompetents by some suitable person akin to them, and due care shall be taken that all persons entitled thereto shall have allotments made to them."

Although this agreement had not been ratified by the Creeks the Commission to the Five Civilized Tribes undertook to carry out the provisions of said rejected agreement and allot the lands of the tribe. A great many allotments were made under this agreement which failed to become a law. In 1900 the Commission to the Five Civilized Tribes negotiated another agreement with the Creeks which was approved by Congress March 1, 1901, ratified by the Creek Nation May 25, 1901, and became effective August 8th, 1902, upon proclamation thereof by the President, and is known as the Original Creek Agreement (31 Stat. L. 861). The general plan of allotment is set forth in Section 3 of said Original Creek Agreement, as follows:

"All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty

cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

If any citizen select lands, the appraised value of which, for any reason, is in excess of such standard value, the excess of value shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and money equal in value to his allotment. If any citizen select lands the appraised value of which is in excess of such standard value, he may pay the overplus in money, but if he fail to do so, the same shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds until all other citizens shall have received lands and funds equal in value to his allotment; and if there be not sufficient funds of the tribe to make the allotments of all other citizens of the tribe equal in value to his, then the surplus shall be a lien upon the rents and profits of his allotment until paid."

The allotments made prior to the Original Creek Agreement under the terms of the Creek Treaty which failed of ratification were confirmed by section 6 of said Original Creek Agreement, which is as follows:

"All allotments made to Creek citizens by said Commission, prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said Commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said Commission."

The first provision by Congress with reference to the Creek law of descent is found in Section 7 of the Original Creek Treaty, which is in the following words:

"Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided,* That selections of homesteads for minors, prisoners, con-

victs, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him.

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, *according to the laws of descent and distribution of the Creek Nation*, free from such limitation."

The Commission to the Five Civilized Tribes, acting under authority of the Secretary of the Interior, was required to allot the lands in severalty, to issue allotment certificates therefor, and to put the allottees in possession of their individual lands. Section 8 of the Original Creek Treaty provides:

"The Secretary of the Interior shall, through the United States Indian agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided, and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land."

Section 23 of said Act of March 1, 1901, provided for deeds to the allottees:

"Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

The principal chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provided for. All lands or town lots to be conveyed to any one person shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge.

All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his deed.

Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment."

The scheme of allotment for the Creek Nation provided that all of the members of the Creek Tribe who were living on the first day of April, 1899, should constitute the *units* for the final distribution of the lands and funds of the tribe; that all the members of the tribe living on that date should be duly enrolled upon the final rolls of the tribe and none other. It was provided that if a member of the tribe had died after April 1, 1899, or should die after that date without enrollment, and without receiving his distributive share of the lands and funds of the tribe, that his name should be put upon the rolls and that *his* allotment and his part of the funds of the tribe should descend to his heirs so as to place his heirs exactly in the same position as they would have been had the allottee lived to take his allotment. Section 28 of the Act of March 1, 1901, provides:

> "No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.
>
> All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time,

or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made and to no other persons."

Section 5 of the Act of April 26, 1906 (34 Stat. L. 137), provides for the issuance of patents in the name of the original allottees to inure to the benefit of their heirs, as follows:

"That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee

shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

In section 46 of the Act of March 1, 1901, it is provided that the tribal government of the Creek Nation should not continue longer than March 4, 1906, subject to such further legislation as Congress might deem proper.

The Supplemental Creek Treaty, Act of Congress of June 30, 1902 (33 Stat. L. 500), at section 6 repealed the Creek law of descent found in sections 7 and 28, Original Creek Treaty, *supra*, in the following words:

> "The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation,

are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided,* That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And *provided further,* That if there be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

This repeal was effective July 1, 1902, under a joint resolution of Congress of May 27, 1902.

The Creek law of descent and distribution had been abolished in 1898 together with all the other laws of the Creek Nation. The Creek statutes put in force by said sections 7 and 28 of the Original Creek Agreement are as follows:

"Be it further enacted, that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons, and all cases where there are no children the nearest relation shall inherit the property. Laws of the Muskogee Nation 1880, p. 132."

"The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no other heirs, and an heir's part if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner. Laws of Muskogee Nation 1880, p. 60."

These sections were statutes of distribution rather than descent, technically speaking, for the Creeks, prior to allotment, had no individual title to land but only such surface rights as they acquired by possession and improvement. Congress made the law of distribution a law of descent.

In connection with the foregoing statutes of descent and distribution, the lower court considered the following sections from the Creek laws, which, however, are not statutes of descent or distribution:

> "All non-citizens, not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have a right to live in this nation and enjoy all the privileges enjoyed by the citizens, except participation in the lands."
>
> —Acts 1890.

> "The courts of this nation shall have and exercise jurisdiction over all controversies arising out of or pertaining to property rights acquired in this nation, and situated in the same by non-citizens who have intermarried with citizens of this nation and by reason of such marriage secured rights and privileges in this nation under which such property was acquired and accumulated by them. The jurisdiction of our courts shall extend to controversies over property and property rights acquired by intermarried non-citizens of our nation who by virtue of this intermarriage with citizens, acquired such property rights and privileges and that irrespective of whether such controversies are between non-citizens and citizens of the

Muskogee Nation or between any persons whomsoever, who claim in this nation property rights under and through such intermarried non-citizens which are by them acquired in the manner aforesaid; and all persons hereafter intermarrying with citizens of this nation shall thereby be deemed to consent that the courts of this nation exercise all jurisdiction over all property rights and privileges that they acquire in this nation by virtue of their said marriage.

All property brought into this nation by non-citizens in consequence of intermarriage of such non-citizens with citizens of this nation shall likewise be under the jurisdiction of the courts of this nation.

Approved April 6, 1894."

Commencing with the Act of Congress of March 3, 1893 (27 Stat. L. 612), Congress inaugurated a new policy for the Five Civilized Tribes. However, the policy of isolation from surrounding country applied to reservation Indians was never characteristic of the government's policy in dealing with the Five Civilized Tribes. In 1890 there were 180,182 persons residing in the Indian Territory of whom only 51,279 were Indians. In 1900 the population of the Indian Territory had increased to 392,000, of which number 52,500 were Indians. The government commenced to plan for a new state and encouraged white people from the surrounding states to settle in the Indian Territory. This new policy of Congress was ever more progressive, always seeking to hasten the time when the five tribal gov-

ernments would be abolished, their laws, customs and courts become a mere matter of history, when the Indians would be in the new state exactly in the same situation as the white people. This progressive policy has been so enlarged that there is now nothing left of the tribal governments except mere empty shells—names, as it were, only. There is nothing now left of the government's guardianship over Indian matters in the former Indian Territory except in the matter of certain restrictions for a limited period upon comparatively small parts of the allotments still in the hands of the original allottees. It must be admitted that now and then in the course of this legislation there has been a backward step. But this has interfered in no way with the rapid progression of the movement to settle completely for all time the Indian question in the Five Civilized Tribes. One of the world's greatest philosophers has said, in effect, that every forward movement progresses by a sort of circular method, each circle progressing further and larger than its predecessor,and in its backward movement intersecting the path behind it. In construing an Act of Congress relating to the closing of the affairs of the Five Civilized Tribes, the intent of Congress can not be found by looking merely at a retrogressive step, but the true intent is discovered rather in the general and progressive and forward movement of the entire legislation as a whole. For the purposes of construction plaintiff in error di-

rects attention only to such sections of the various Acts of Congress as seem to indicate a retrogressive policy—calls, as it were, to the past—ignoring the great body of the legislation, forgetting that every such backward step has been speedily retraced with the result that the government *advanced in a still larger and more liberal policy*, more and more clearly indicating the intention to make all citizens of the Indian Territory alike as soon as possible in respect to their property rights, as well as in matters political.

The Creek Nation responded with considerable readiness to this new policy of Congress. This dependent nation established in this territory in 1833, had a written constitution, written laws, a government organized after the fashion of our own, the legislative branch thereof being composed of the House of Kings and House of Warriors, corresponding to our Senate and House of Representatives; a Principal Chief, corresponding to our chief executive; a Supreme Court, with jurisdiction very similar to that of our own. But the tribal authorities readily consented to the dissolution of their tribal government, agreeing to abolish their constitution, all of their laws, their legislative body and their courts. The policy of exclusion of non-citizens of the Creek Nation which, however, had never applied to intermarried whites (and of such class is the non-citizen herein involved), gave way under the influences of the government, as evidenced by

the Creek statute above quoted enacted in 1890, providing that *all non-citizens not adopted or married to citizens of the nation or not having children entitled to citizenship*, should have the right to live in the Creek Nation and enjoy the privileges to which other citizens were entitled, excepting only the participation in the annuities of the tribe and in the final distribution of the lands. This more liberal policy is manifested in clearer fashion by the act of Creek Council of April 6, 1894, quoted by the Supreme Court of Oklahoma in the case of *deGraffenreid* v. *Iowa Land & Trust Company*, 95 Pac. 627, 20 Okla. 687, which provides in the broadest terms that non-citizens of the Creek Nation should have all the rights of the citizens of the tribe *which would include the right of inheritance*, barring such non-citizens only from the tribal right of each enrolled citizen to participate in the final distribution of the lands as a unit of such distribution. There had been many intermarriages between the Indians and the white people, many children of the mixed-blood had been born the issue of these marriages. The Creeks agreed that all such of the mixed-blood of however remote degree of Indian blood, should be enrolled upon the final rolls of the tribe to share equally with other members of the tribe in the lands and funds belonging to the tribe. Under such changed conditions the old Creek statutes of exclusion relating to non-citizens, quoted in the brief of plaintiff in error, can have no possible application. The

right of inheritance being one of the privileges enjoyed by citizens of the Creek Nation, was necessarily conferred upon all non-citizens in the tribal domain by the foregoing Creek statutes conferring upon such residents *all rights* of the tribe except the right to participate in the final distribution of the common property. But long before allotment was thought of the Creek Nation had adopted a liberal policy toward intermarried whites who because of their intermarriage were placed upon a different plane from other non-citizens. In the compilation of Creek laws, published in 1890 by L. C. Perryman, which is the only authorized edition of the Creek laws, we find, under article 4 and the caption "Rights and Disabilities of Non-citizens," the following two sections:

> "*Section 1.* No non-citizen shall have a right to reside in or to own any kind of property within the Muskogee Nation, except by permit, and any non-citizen, without a permit, who shall make any improvements within the Muskogee Nation shall forfeit the same to the nation.
>
> *Sec. 2.* This article shall not be construed so as to interfere with persons who are intermarried with citizens of the Muskogee Nation, or so as to interfere with any rights guaranteed by treaty."

We find under the caption "Traders," at article 5 of the same compilation, the three following sections:

"*Section 1.* All persons who carry on any business transaction within the limits of this nation, under license from the United States Government, shall be required to pay the sum of one hundred dollars per annum into the national treasury of this nation, and it shall be the duty of the Light Horse captains to collect the same.

Sec. 2. No non-citizen licensed trader, who has not intermarried with a citizen of this nation, shall be allowed to inclose more than two acres of our public domain, nor be allowed to cut and put up hay from our common pasturage, and any non-citizen, not intermarried, licensed trader, found cutting and putting up hay from the common pasturage, shall be fined ten dollars per acre, for each acre so cut and put up.

Sec. 3. No non-citizen, not intermarried, licensed trader, shall be allowed to keep stock ranches nor permanent herds of cattle within the limits of this nation and any licensed trader of this class, who shall disobey this provision, shall be reported to the United States agent, by the district attorney in whose district the trader is doing business, with the request that said person's license be revoked, and that they be removed from the limits of the Muskogee Nation."

Under the foregoing laws it must appear at once that the rights of intermarried non-citizens were different and much greater than the rights of non-citizens not intermarried.

The above quoted sections, the one from the Creek laws of 1890, and the other from the laws of

1894, which we will call for brief expression the Creek statutes of exclusion from final distribution in the lands, are not statutes of descent or distribution in any sense, and the same were absolutely and forever abrogated, as hereinbefore set forth, in the year 1898. When Congress put the Creek law of descent in force in the acts above cited, there was merely re-enacted the two sections of the Creek law referred to as sections 6 and 8, *supra*. These two sections constitute the entire law of Creek descent. For the purpose of showing that there were no other Creek statutes of descent, we quote chapter 10, in full, Perryman's Compilation Constitution and Laws of Muskogee Nation, 1890, the same being styled: "Administration of Property."

> "*Section 1.* When any male citizen of this nation shall die without having made a will, it shall be the duty of the judge of the district wherein such deceased person may have resided, to grant letters of administration to any citizen of this nation who may request the same, and such person shall be required to give bond in double the value of such estate, with at least two good securities, each of whom shall also own property equal to twice the value of such estate.
>
> *Sec. 2.* All estates of deceased persons shall be valued by the judge and two disinterested persons.
>
> *Sec. 3.* The administrator shall, at all times, be required to make and provide liberal means for the support and education of all heirs of the deceased, to make any trade that

may be of advantage to such estate, and to advise and direct the affairs of such heirs until they shall have become of age, according to the laws of this nation, or until such heirs shall marry, in which event the administrator shall turn over to such heirs of his or her inheritance everything connected with the estate that may have been placed in his care, or its equivalent in money or other property.

Sec. 4. If an administrator, when required to do so, fails to turn over everything connected with an estate of which he shall have had charge, or its equivalent in money or other property, the proper authority shall seize the goods or property of his securities, and appropriate therefrom sufficient to make up any deficiency that may occur in the value of the estate; and if any person shall sign a bond as security, and afterwards die, the estate of such security shall in all cases be held responsible.

Sec. 5. When no person shall ask letters of administration, it shall become the duty of the judge to appoint a suitable person, who upon giving sufficient bond and security shall act as administrator.

Sec. 6. In case of the death of a female, if there be a husband and children living, he shall have the preference of administratorship, and in the event of there being no children living, the nearest relative shall have preference.

Sec. 7. The administrator or administratrix of an estate shall be entitled to twenty-five per cent of every dollar's worth of such estate that may be rendered at the expiration of such administration.

Sec. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-

half of the estate, if there are no other heirs, and an heir's part, if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner.

Sec. 9. The homestead and household and kitchen furniture, one work-horse, one cow and calf, and one breeding sow, shall be exempt from seizure or forced sale for any debt.

Sec. 10. Provided that an estate is solvent, the administrator shall settle up and cancel all debts and accounts against the estate out of the estate's effects."

The two sections of the Creek law above quoted which we style the statutes of exclusion from participation in the lands, do not appear in any of the Creek laws as statutes of descent, but under the heading "Non-citizens." Congress could not have revived these sections relating to non-citizens merely by re-enacting the Creek statutes of descent and distribution. Nor should these statutes of exclusion from participation in the lands be looked to even for the purposes of construction of the Creek laws of descent, for the spirit and situation of the Creek Nation had so changed that the Creek statutes abolished in 1898 cannot be looked to in determining the intention of the Creek legislature in the matter of their statutes controlling the devolution of property. When the question here involved was first reached by the Supreme Court of Oklahoma in the *deGraffenreid* case, *supra*, the state court adopted this view, saying:

"But it would seem that the Act of April 6, 1894, shows a recognition of certain rights theretofore acquired by intermarried citizens. In part, it says: 'The jurisdiction of our courts shall extend to controversies over property and property rights acquired by intermarried non-citizens of our nation, who, by virtue of this intermarriage with citizens, acquired such property rights and privileges,' * * * and would seem to refer to the act of the Creek Council, set forth in the Compilation of 1890 (page 66), *supra*: '*Sec. 1.* All non-citizens, not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have the right to live in this nation and enjoy all privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands.' Now, whatever might have been within the purview of the Creek Council at the time of the enactment of sections 6 and 8 of their statutes of descent and distribution, this section 1, perhaps, and of necessity the Act of April 6, 1894, *supra*, was enacted in view of fast approaching allotment, and gives, without reserve, to the intermarried non-citizen, 'all privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands.' This act was intended to and did extend to the intermarried non-citizen the right to inherit under tribal law, and put him on the same footing, under that law, with all other citizens, except, as so aptly expressed by the learned judge of the United States Court for the Western District of the Indian Territory in the case of *Edward Porter et al.* v. *Eck E. Brook*, 'that he shall not be counted in making up the great

fraction which shall express what share of the soil shall belong to each citizen; that is, he shall not receive an allotment'."

In the case of *Leak Glove Mfg. Co.* v. *Needles*, 69 Fed. Rep. p. 69, the Circuit Court of Appeals for the Eighth Circuit held that where a statute at one time in force in the State of Arkansas had been extended by Congress over the Indian Territory, that the same should be considered just as if Congress had passed an act in the exact words of the Arkansas statute. On this point, then, the situation is, as regards the Creek law of descent, the same as if Congress had merely enacted the two following sections:

> "*Sec. 6.* Be it further enacted that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons and in all cases where there are no children, the nearest relation shall inherit the property."
>
> "*Sec. 8.* The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no heirs, and an heir's part if there should be other heirs in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner."

But if said sections intended to exclude non-citizens from participating in the final allotment were to be considered as affecting the said Creek statutes of descent and distribution, they would foreclose the contention of the plaintiff in error,

for by their express terms they provide *that all non-citizens not previously adopted, being married to citizens of the Creek Nation, shall have all the rights of citizens of the nation (which includes the right of inheritance from citizens of the Creek Nation) and to enjoy all the privileges enjoyed by citizens of the Creek Nation except participation in the final distribution of the lands.* This clearly shows that by the Creek law a non-citizen of the Creek Nation acquired *property rights and property privileges.* What other kind of rights could a non-citizen acquire by intermarriage? This act of the National Council of the Creek Nation of 1894 clearly concedes that under the law then existing a non-citizen, intermarried to a Creek, acquired "property rights and privileges." The only property rights a non-citizen could acquire by intermarriage would be the right of inheritance—the right to take property by descent. This was in accord with the natural order of things, because the surviving spouse was charged with the maintenance of the children, the issue of the marriage, and as such should be given the dignity and capacity suitable to the protector of such offspring. In this consideration the right of curtesy had its origin.

The Supreme Court of the Creek Nation, in the case of *Gibson* v. *Davidson*, decided by the Supreme Court of that nation in 1893, set the point under discussion at rest. At that time the courts of the Creek Nation had no jurisdiction over con-

troversies between citizens of the Creek Nation and citizens of the United States. The *Gibson* case finally reached the United States Courts, and a statement of the facts involved will be found in the opinion of the Circuit Court of Appeals reported in 56 Fed. Rep. 443, 5 C. C. A. 543. Julia Gibson, the wife of Edward Gibson, died in April, 1891. The Creek Supreme Court held that the courts of the Creek Nation had no jurisdiction of the controversy upon the ground that the non-citizen husband took Creek property under the foregoing Creek statutes *as heir of his wife.* This decision of the Supreme Court of the Creek Nation is squarely in point. It is not an ordinary case where the court refuses to pass upon the merits for lack of jurisdiction. That court had to decide, first of all, whether the non-citizen husband inherited from his wife, for if he did so inherit then in that event the courts of the Creek Nation under the Creek statutes would not have jurisdiction to determine the controversy. This authoritative construction of the Creek law of descent whereby the non-citizen husband was permitted to inherit from his wife was regarded by the Supreme Court of Oklahoma, in the *deGraffenreid* case, *supra*, as very persuasive, if not conclusive, the court saying:

> "The opinion of the Supreme Court of the Creek Nation in that case, 'relative to Edward Gibson, finds that he is not a *bona fide* citizen of the M. N. (Muskogee Nation), and simply entitled to his own property, and an heir's part

of the Julia Gibson estate; and therefore, dismiss the case for want of jurisdiction of Edward Gibson.' This controversy, to be sure, was over personal property, but the construction was made by that court in the face of impending allotment, which came shortly following the creation of the Dawes Commission in 1893, and was, no doubt, made with full knowledge of its far-reaching effect. And, furthermore, when in the 'Original Agreement' the Creek people said that the allotments made thereunder should descend under the laws of descent and distribution of the Creek Nation, it necessarily follows that they meant that therein the intermarried non-citizen husband should receive out of his citizen wife's allotment an heir's part under section 1, *supra*, pursuant to the ruling of the Supreme Court of the tribe in the *Gibson* case. It is well settled that: '* * * Whenever Congress in legislating for the District of Columbia or the territories has borrowed from the statutes of a state provisions which had received in that state a known and settled construction before their enactment by Congress, that construction must be deemed to have been adopted by courts together with the text which it expounded, and the provisions must be construed as they were understood at the time in the state.' 26 Am. & Eng. Enc. of Law, p. 702. And as there is no reason why the laws of the Creek Nation and the decisions of its Supreme Court should be placed upon a different footing from those of any other state or territory of the Union (*Mackey et al.* v. *Cox*, 18 How. 100, 15 L. ed. 299), we are of the opinion that when Congress, by the terms of the 'Original Agreement,' adopted the laws of descent and distribution of the Creek Nation,

supra, it, at the same time, adopted the construction placed thereon prior thereto by the Supreme Court of that nation, and that we are bound by that construction."

The said Act of April 6, 1894, conferring jurisdiction upon the Creek courts to try property rights between citizens of the Creek Nation and non-citizens of the Creek Nation, was intended to meet the situation defined by the *Gibson* case, *supra.* By virtue of this Act of April 6, 1894, the Creek courts could partition and distribute the estate of a deceased Creek Indian even though one of the heirs was a non-citizen of the tribe.

Under a subsequent heading in this brief entitled "The heirs took the allotment by inheritance and not as allottees," etc., we shall attempt to show fully that these exclusion statutes prohibiting non-citizens from participating in the final distribution of the lands in no way interfered with the taking by inheritance or as if by inheritance the allotted Creek lands by non-citizen heirs where the allotment was made to the heirs as provided in section 28 of the Original Creek Treaty, *supra.* As suggested in the brief for plaintiff in error, this question was first decided many years ago (to be exact, September 6, 1905) in the United States Court for the Western District of the Indian Territory, Judge Raymond presiding, in the case of *Porter* v. *Brook,* in which case the learned judge announced his opinion, in part, in the following language, referring to said

sections excluding non-citizens from participation in the lands:

> "Clearly this pertains to the final division of the lands among the citizens of the nation. In other words, that he (the non-citizen) shall not be counted in making up the great fractions which shall express what share of the soil shall belong to each citizen, that is, he shall not receive an allotment. If it is true that a non-citizen father may inherit from his son, who dies intestate leaving no wife or child, this is not permitting him to participate in the final division of the lands. *He receives nothing from the Creek Nation. He is not counted in making up the fractions which shall express what share of the soil shall belong to each citizen.* He becomes the owner of a portion of the child's estate because of his kinship to the child, the same going to him, not from the Creek Nation, but from the child to whom the Creek Nation had granted it, *and this share to him in no wise diminishes the proportionate share of the Creek citizen in the final division of the lands.*"

Mullen v. *United States.*

The case of *Mullen* v. *The United States,* 224 U. S. 448, 56 L. ed. p. 834, completely forecloses the contention made by the plaintiff in error. It involved the construction of the Choctaw-Chickasaw Supplemental Agreement, particularly section 22 thereof, which provides as follows:

> "If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this

agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided,* That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted."

Said section 22 is in every way similar to section 28 of the Original Creek Agreement, *supra.* There is this formal difference: Section 22 of the Choctaw-Chickasaw Agreement provided that all patents should be issued in the name of the allottee, the same to inure to the benefit of the heirs, whereas section 28 provides for the issuance of patents to the heirs. In the *Mullen* case this distinction was held as unimportant, the court broadly announcing that where the allotments in the Choctaw-Chickasaw nations were made or selected after the death of an allottee who would have been entitled to receive the same had he lived, that the same would pass by descent or as if by descent to his heirs, whether citizens or non-citizens of those tribes, and as of the date of the death of the allottee, saying:

"The question now presented—with regard to the conveyances made to the appellants —arises in the second class of cases; that is, where a person whose name appeared upon the rolls died after the ratification of the agreement and before receiving his allotment. In this event, provision was made for allotment in the name of the deceased person, and for the descent of the lands to his heirs. This is contained in paragraph 22 of the Supplemental Agreement:

> *22.* If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution, as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.'

In the cases falling within this paragraph, there is no requirement for the selection of any portion of the allotted lands as a homestead, and there is no ground for supposing that it

was the intention of Congress that a provision for such selection should be read into the paragraph, so as to assimilate it to paragraph 12, relating to allotments to living members. While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. *No distinction is made between the heirs; they might or might not be members of the tribe; and where there were a number of heirs, each would take his undivided share.* It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of a portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute.

In the agreement with the Creek Indians (Act of March 1, 1901, 31 Stat. L. 861, chap. 676), it was provided that in the case of the death of a citizen of the tribe after his name had been placed upon the tribal roll made by the Commission, and before receiving his allotment, the lands and money to which he would have been entitled, if living, should descend to his heirs, 'and be allotted and distributed to them accordingly.' The question arose whether, in such cases, there should be a designation of a portion of the allotment as a homestead. In an opinion under date of March 16, 1903, the then Assistant Attorney General for the In-

terior Department (Mr. VAN DEVANTER) advised the Secretary of the Interior that this was not required by the statute. He said: 'After a careful consideration of the provisions of law pertinent to the question presented, and of the views of the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes, I agree with the latter that in all cases where allotment is made directly to an enrolled citizen, it is necessary that a homestead be selected therefrom and conveyed to him by separate deed; but that where the allotment is made directly to the heirs of a deceased citizen, there is no reason or necessity for designating a homestead out of such lands, or of giving the heirs a separate deed for any portion of the allotment, and therefore advise the adoption of that rule.' It is true that under the Creek Agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw Agreement the allotment was to be made in the *name* of the deceased member, and 'descend to his heirs.' This, however, is a merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the names of the heirs furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead."

Let us see whether non-citizens of the Choctaw and Chickasaw Nations were prohibited from participating in the final distribution of the lands just

as they were in the Creek Nation. *They were, in the broadest terms.* The Choctaw-Chickasaw laws not only prohibited such final participation, but various Acts of Congress in broad terms provided that non-citizens of those nations should not participate in the final allotment and distribution of the lands. We need not go further than the Acts of Congress. The Act of June 28, 1898, at section 21, provides, in part, as follows:

> "The several tribes may, by agreement, determine the right of persons who for any reasons may claim citizenship in two or more tribes and to allotment of lands and distribution of moneys belonging to each tribe. * * * The rolls so made, when approved by the Secretary of the Interior, shall be final and the persons whose names are found thereon with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws shall alone constitute the several tribes which they represent."

The Choctaw-Chickasaw Agreement (32 Stat. L. 641) provides:

> "*No person whose name does not appear upon the rolls prepared as herein provided, shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes,* and those whose names appear thereon shall participate in the manner set forth in this agreement: *Provided,* That no allotment of land or other tribal property shall be made to any person or to the heirs of any person whose name is on the said rolls and who died prior to the date of the final ratification of this agreement."

The language of the acts of the Creek Council above quoted passed in 1890 and 1894, providing that non-citizens of the Creek Nation should not participate in the final distribution of the lands, are no broader in terms than the express Acts of Congress relating to the Choctaws and Chickasaws; yet we find that this court has said, in plainest terms, in the *Mullen* case:

> "No distinction is made between the heirs; *they might or might not be members of the tribe;* and where there were a number of heirs each would take his undivided share."

It is clear, therefore, that Congress put the Creek law of descent and distribution in force to determine in cases where the allotments were made to the heirs, who would take the land and the proportions in which they would take the same, and that where the heirs or any of them, were non-citizens of the Creek Nation they would take by inheritance, or, if the term inheritance is technically incorrect, as if by inheritance *and as if the dead citizen had received his allotment in his lifetime.*

The decision of this court in the *Mullen* case permitting non-citizens of the Choctaw and Chickasaw Nations to take as heirs where the allotment was made to the heirs, is in thorough accord with the new policy of Congress to put the Indians and whites upon the same plane as rapidly as possible. In this connection we direct attention to *Re Heff*,

197 U. S. 488, 49 L. ed. 848, and particularly to the following language used by Mr. Justice BREWER:

> "Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation; but when that purpose is made clear the question is at an end."

But if a non-citizen of the Creek Nation were excluded from taking as an heir of the deceased citizen who died without receiving his allotment, the result in this case would be the same. Minnie Solander, the citizen entitled to receive the 160 acres of land, died in October, 1899, leaving not only her non-citizen husband, George Solander, but a daughter, Hettie, who was a citizen of the Creek Nation.

Under the construction of the law, and as announced by the Supreme Court of Oklahoma and the Circuit Court of Appeals for the Eighth Circuit, the devolution of this property should be considered as passing as of the date of the death of Minnie Solander, one-half to her non-citizen husband and one-half to her child, Hettie; but if the non-citizen husband did not take, the devolution must be counted as if Hettie, the Creek citizen, took it all. Hettie died in November, 1899, leaving her said father, George Solander, the non-citizen of the Creek Nation. On the other hand, since it is manifest from the various Acts of Congress relating to the allotments to be made to the heirs that they should take just as if their ancestors had received the lands, then this estate must be considered, if plaintiff in error's contention prevails, as passing to Hettie, and from Hettie to her father, the non-citizen.

Section 6 of the Supplemental Creek Treaty, *supra,* invoked upon behalf of plaintiff in error, which provides, in part, that only citizens of the Creek Nation and their "Creek descendants," shall inherit lands of the Creek Nation and providing, further, that if no person of the Creek citizenship or Creek descent shall take the descent, that the estate shall go to non-citizens, has no application here, because the allotment was selected and certificate therefor issued, and the equitable estate thereto passed to the heirs prior to the enactment of section 6. The Creek law, without any such inhibition

excluding a non-citizen of the Creek Nation from inheritance, was in full force and effect from April 1, 1899, until the first day of July, 1902, the date when the Supplemental Creek Treaty became effective. Nor does said section 6 aid in the construction of the Creek law, unless it is to show that theretofore, as understood by the Creeks, non-citizen heirs took allotted lands where the allotments were made to the heirs. But the short life of this inhibition against inheritance by non-citizens proves the point heretofore made that every backward or reactionary step was speedily corrected or retraced, for, in the Act of April 28, 1904, we find that Congress provided:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedman or otherwise."

Probably one of the effects of this act was to repeal the inhibition in said section 6 directed against inheritance by non-citizens of the Creek Nation where the allotment was made to the heirs. If this was not accomplished, certainly the repeal was effected with the coming of statehood, by the provision in the Enabling Act, at section 21 thereof, providing:

> "And all the laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force

> throughout said state except as modified or changed by this act or by the constitution of the state."

At the most, therefore, the discrimination, contained in said section 6, against non-citizens of the Creek Nation was short-lived.

The contention that non-citizens of the Creek Nation were considered as *aliens* within the period between April 1, 1899, and July 1, 1902, is wholly without support in reason or authority. As was said in *Crane* v. *Reeder*, 21 Mich. 24, cited upon behalf of plaintiff in error, the ground upon which aliens are excluded from inheritance, is this:

> "There has always been a policy aiming at inducing aliens to become citizens, but none which would render it indifferent to them whether they became citizens or not."

Surely the Creek Nation never treated non-citizens of the tribe as aliens in order to induce them to apply for citizenship in the tribe, a right which they guarded with considerable jealousy, since the enrolled members of the tribe were to be considered as the *units* for the final partition or distribution of the public domain of the tribe. Moreover, a series of congressional acts and treaties cited in *Re Heff*, *supra*, show the intention of Congress and of the Creek tribe to place citizens and non-citizens, as regards the right of citizenship, in the same class. On the 3rd day of March, 1901 (31 Stat. L. 1073), all the Indians of the Five Civil-

ized Tribes were made full citizens of the United States. Therefore, both the Indians and the white people were citizens of a common country and were not aliens as to each other. The presumption always prevails that the citizens of a common country may inherit from each other freely, unless there is an express statute to the contrary. There was no law, express or implied, prohibiting such inheritance by a non-citizen within the period beginning April 1, 1899, and ending July 1, 1902, the time at which the descent in this case was cast.

The heirs took the allotment by inheritance and not as allottees, and as of the date of the death of their ancestor, each enrolled citizen's right to an allotment vesting as of April 1st, 1899.

Under the plan of allotment set forth in the Acts of Congress hereinbefore quoted all of the enrolled citizens of the Creek Nation living on the 1st day of April, 1899, were to receive allotments—that is to say, they alone were to constitute the *units* for the final partition and distribution of the public domain of the Creek Nation. Under the provisions of section 28 of the Original Creek Agreement, if an enrolled citizen had died, or should die, before actually receiving his allotment certificate, nevertheless the land to which he would have been entitled, if he had lived, was to be set aside as *his* allotment and the same should descend to the heirs of such

deceased allottee under the Creek law. Every citizen living on April 1, 1899, shared the lands equally. Where an allotment was made to the heirs of a citizen they did not take it as an *additional allotment*, or as an *additional bounty*, but *in the right of the original allottee* and as from him. In cases where the lands were allotted to the heirs they did not take directly from the tribe by allotment, *but through their ancestor's right*—not by purchase—*but by descent*. This consideration alone relieves the defendant in error from the charge made by plaintiff in error to the effect that the non-citizen husband is attempting to take directly from the Creek Nation and thereby share as an allottee in the final distribution of the tribal lands. To decree that the husband—a non-citizen of the Creek Nation—took an interest in the allotment of his deceased wife as an heir, is not to enlarge to any extent the number of tribal *units* for the final partition and distribution of the tribal property. His wife, though dead, constituted one of these units upon which the division was made. The acts of the Creek Council of 1890 and 1894 hereinbefore quoted, excluding non-citizens of the Creek Nation from participation in the final distribution of the lands of the tribe, are given full force and effect by the enrollment of the deceased wife and by the allotment to her to inure to the benefit of her heirs. By this scheme the non-citizen husband was excluded from participation. He was not enrolled; no allot-

ment was made to him—he was merely one of the heirs, provided by the Creek law to take the right and estate carved out for his wife, an enrolled citizen. The descent was cast in every respect just as it would have been had the wife lived to select and actually receive her 160 acres of land, the same being her proportionate part of the tribal public domain.

In *Shulthis* v. *McDougal,* 170 Fed. 529, this identical question arose, and after the most careful consideration the Circuit Court of Appeals for the Eighth Circuit held that it was wholly immaterial whether the ancestor or citizen entitled to receive the allotment, was actually seized of the property in his or her lifetime; that the allotment to which the citizen would have been entitled, had he lived, passed to the heirs *in the right* of the deceased citizen, and *not directly* from the Creek Nation, so that the situation is, in all respects, the same as regards those who inherit and the proportions taken by them as if there had been a technical descent from the citizen entitled to the allotment, using the following language:

> "The word 'descend' is, of course, inapplicable to the actual contingency provided for by the statute, because that contingency contemplates the death of the child before he had actually become seized of any interest in the land. The word 'descend' is a word of art, and indicates the transference of property by inheritance. If any significance is to be given

to it as used in this section, it must be held that the intent of the parties to the agreement was that the land should pass to the same persons and in the same proportions as it would have passed if the child had died seized of it. *Any other construction* simply obliterates this word, and makes the land pass to the parties who are heirs *directly by allotment from the tribe.* The statute itself not only declares that it shall 'descend,' but also declares that it shall be 'allotted and distributed,' to the heirs. It is manifest, therefore, that both ideas were in the minds of the parties to the agreement.

This construction receives further support by the general scheme which the federal government and the Creek Nation formed for the disposition of the tribal property. The first requisite for the partition of the tribal estate in severalty among its members was to ascertain and legally establish who were members of the tribe. By reason of the many intermarriages between members of the tribe and members of the white and negro races, and by reason of the fraudulent claims to membership, the ascertainment of the particular persons who were in fact entitled to such membership proved a much more difficult task than was at first anticipated. The Commission was empowered and directed to prepare such a roll. This work not only required much investigation on its part, but resulted in voluminous litigation. Instead of being a work of months, it proved to be a work of years. In the meantime, however, the membership of the tribe was constantly undergoing change by birth and death. In order to provide for all members of the tribe who were born subsequent to the begin-

ning of the enrollment, the date of right to enrollment was twice set forward, the statute last quoted fixing the latest date. By reason of these facts, when the roll was completed, it contained more names than there were members in being. The roll, however, furnished the basis for the division of the tribal estate. Every person whose name was entered on the roll was entitled to an equal proportion of the tribal land and funds; but by reason of the fact that before actual distribution could be made, and even while the enrollment was in progress, some persons whose names were on the roll would die, the statute made provision for the disposition of the share of tribal property undistributed. It was never the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing such land as a bounty, but was simply providing for the right of inheritance.

Congress itself has construed this statute. Section 5 of the act (Act April 26, 1906, c. 1876, 34 Stat. 137) provides:

> 'That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs; and in case any allottee shall die after the restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life; and all

> patents heretofore issued where the allottee died before the same became effective, shall be given like effect.'
>
> Here is an express declaration by Congress that the land shall descend to heirs the same as it would have descended if the patent or deed had issued to the allottee during his life, and it is declared that allotments for allottees who have died shall also thus descend. This interpretation by Congress of its own act leaves no room for doubt as to its intent."

In *McKee* v. *Henry*, 201 Fed. 74, a similar question arose and the Circuit Court of Appeals again announced the same rule of construction approving a line of Oklahoma cases decisive of the question here under discussion, among them the case of *Shellenbarger* v. *Fewell*, 124 Pac. 617, 34 Okla. 79, the same being one of the cases here submitted.

In *Shellenbarger* v. *Fewell, supra*, there is an excellent discussion of this point by the Supreme Court of Oklahoma as follows:

> "We now come to consider the remaining proposition in the case. The record is silent as to the date of the selection of the allotment; but from the admissions in the agreed statement of facts, and the briefs of both parties, we must conclude that the allotment was selected and certificate thereof issued under the 'Original Creek Agreement.' Act of Congress of March 1, 1901, c. 676, 31 Stat. 870.
>
> Such being the case, the allotment of Minnie Solander, not having been made at the date of her death, but later, made under the 'Original

Creek Agreement,' *supra*, the same descended to her heirs according to the law of descent and distribution of the Creek Nation, as admitted and contended by both parties in this case. In the case of *deGraffenreid et al.* v. *Iowa L. & T. Co.*, 20 Okla. 711, 95 Pac. 624, in discussing the Original Creek Agreement, on this point it is said: 'In short, sections 6 and 7 of this agreement fix the descent of the allotment (both surplus and homestead) in cases where the allottee receives his allotment before he dies, and section 28 fixes it in cases where he dies before receiving his allotment. In either case it was intended to "descend to his heirs according to the laws of descent and distribution of the Creek Nation".'

In the case of *Barnett* v. *Way*, 29 Okla. 780, 119 Pac. 418, it is said: 'We think it was the intent to provide that the land to which a deceased Indian, who was entitled to an allotment, should be allotted to and received by those persons as heirs of such Indian that would have received it under the Creek laws, if the allotment had been made to the deceased at the time of his death and had descended under said law.' In the *Barnett* case, *supra*, the allotment was selected and certificates issued under the 'Curtis Act' (Act June 28, 1898, c. 517, 30 Stat. 495), which provided for an allotment of the use and occupation of the surface only, and the Indian entitled to the allotment died before the adoption of the Original Creek Agreement. In the body of the opinion it is said: 'What the rule of descent and distribution was at the time of the death of Cita Barnett and her father, George Barnett, is unimportant; for, at the time of her death, she had no title, equitable

or legal, in the fee in her allotment to descend. The rule of descent and distribution adopted by the treaty and to be applied in such case is the rule of descent and distribution in force in the Creek Nation, governing the devolution of property owned by any of its deceased members at the time of such member's death.'

It has been held in *Brady* v. *Sizemore,* 124 Pac. 615 (not officially reported), that where a duly enrolled citizen of the Creek Nation died before receiving his allotment, and it was later allotted to his heirs, August 23, 1902 (under the 'Creek Supplemental Agreement' Act of Congress approved June 30, 1902, ratified July 26, 1902), that the devolution of the allotment is governed by chapter 49 of Mansfield's Digest of the Laws of Arkansas (Ind. T. Ann. St. 1899, Secs. 1820-1843), to be applied as if deceased had received title to his allotment and died seized thereof. See *Sanders* v. *Sanders,* 28 Okla. 59, 117 Pac. 338; *Hooks* v. *Kennard,* 28 Okla. 457, 114 Pac. 744; *Barnett* v. *Way, supra,* and *Brady* v. *Sizemore, supra.*

It may be gathered from a reading of the cases decided in this court, upon the question of the devolution of a Creek allotment, that the law of descent, in force at the date the selection of the allotment takes effect, governs as to the classification of the heirs; and this law relates back to the death of the Indian entitled to the allotment, and identifies the heirs as of that date.

The selection of an allotment, under the 'Curtis Act,' *supra,* though made prior to, takes effect upon the date of the approval of the Original Creek Agreement, *supra,* and allotments so selected, together with those selected under

the 'Original Creek Agreement,' pass to the heirs of the Indian entitled to take the allotment, under the Creek laws of descent; while those allotments selected under the Creek Supplemental Agreement (Act of Congress June 30, 1902, c. 1323, 32 Stat. 500) pass under the laws of descent found in chapter 49 of Mansfield's Digest of the Laws of Arkansas. In either event, you take the governing law of descent, and carry it back to the date of the death of the Indian entitled to take the allotment, and identify the heirs of such Indians, under such law of descent, as of the date of such death.

(5) Then who were the heirs, under the Creek law of descent, of Minnie Solander? Plaintiff contends they were her non-citizen husband, George Solander, and her daughter, Hettie Solander. Defendant contends that her sister Phoebe Trusler was her heir, for the reason that her daughter Hettie died before the selection of the allotment, and that her non-citizen husband could not inherit.

We think, under the law and the decisions of this court, that the contentions of the plaintiff are correct. That the non-citizen husband would take an heir's part, under the Creek law of descent, has been held by this court, upon exhaustive and satisfactory reasoning. In *de-Graffenreid* v. *Iowa L. & T. Co., supra*, it is said: 'When in the original agreement the Creek people said that the allotments made thereunder should descend under the laws of descent and distribution of the Creek Nation, it necessarily follows that they meant that therein the intermarried non-citizen husband should receive out of his citizen wife's allotment an heir's part, etc.' That an allotment, under circumstances similar to the ones here, would go to the heirs,

as of the date of the death of the Indian entitled to the allotment, has been held in *Barnett* v. *Way,* and *Brady* v. *Sizemore* and *Morley* v. *Fewel,* 122 Pac. 700 (not officially reported), *supra.* Therefore, her daughter Hettie, being alive when her mother died, and being the only child, and her non-citizen father being held entitled to take an heir's part, it follows that the allotment of Minnie passed to George and Hettie Solander in equal parts, and upon the death of Hettie Solander, intestate and without issue, December 19, 1899, her share was cast upon her father, George Solander, as her nearest relation, who had the right April 27, 1906, to convey the whole estate to plaintiff as was done."

In *Ground* v. *Dingman,* decided November 12, 1912, 127 Pac. 1078, 33 Okla. 760, the Supreme Court of Oklahoma clearly and forcibly presents the point here under discussion as follows:

"Although seized of no estate of inheritance therein, that this land went, whether by descent or purchase it is immaterial to say, by virtue of section 28, *supra,* to the heirs of Susan Thompson, as designated by the Creek law, *supra,* in being at the time of her death, is no longer an open question in this jurisdiction.

In *Barnett et al.* v. *Way et al.,* 29 Okla. 780, 119 Pac. 418, Cita Barnett, an enrolled citizen of the Creek Nation, selected her allotment under section 11 of the Curtis Act, and died before the ratification of the original Creek treaty (Act March 1, 1901), wherein, by section 6, her allotment was ratified to her heirs. It was there held that the Creek law of descent and distribution governed the devolution of the estate, pursuant to section 28, *supra;* and that her

father her surviving, took her allotment as though she had received title thereto during her lifetime and died seized thereof. In the syllabus the court said: 'The descent and distribution of the allotted lands of an enrolled Creek Indian, who died before the ratification of the Original Creek Treaty (Act March 1, 1901, c. 676, 31 Stat. 861), and who had during her lifetime allotted to her, under section 11 of the Curtis Act (Act June 28, 1898, c. 517, 30 Stat. 495) the use and occupancy of the surface of the allotment, which was thereafter, by section 6 of the Original Creek Treaty, ratified and deed issued to her heirs therefor is, by reason of Section 28 of the Original Creek Treaty regulated and controlled by the law of descent and distribution of the Creek Nation. In determining who are the heirs of a deceased enrolled Creek Indian, who, during her lifetime, received the allotment of the use and occupancy of an allotment, which, after her death, was ratified to her heirs by virtue of section 6 of the Original Creek Treaty (Act March 1, 1901, c. 676, 31 Stat. 861), the laws of descent and distribution of the Creek Nation are to be applied as if the deceased Indian had received title to her allotment during her lifetime and died seized thereof.'

As there is no substantial difference between the facts in that case and this, and in neither did the allottee die seized of an estate of inheritance, the law there announced, in effect, that, having died before receiving her allotment, the land went to her heirs under the Creek law precisely as though the allottee was so seized at the time of her death, will be followed here.

In *Morley et al.* v. *Fewel*, 122 Pac. 700, the facts were that Minnie Solander, the allottee, a citizen of the Creek Nation living on April 1, 1899, and duly enrolled as such, died intestate on October 8, 1899, leaving her surviving George A. Solander, her husband, and Hettie L. Solander, her child, who died intestate, without issue, December 19, 1899; that Phoebe Trussler was the only sister of Minnie Solander, who left no brother surviving, or the descendants of any brothers or sisters; that on December 3, 1901, the Commission to the Five Civilized Tribes, set apart the allotment of Minnie Solander, to which a patent was issued in the name of her heirs. The only question in that case was: Did George A. Solander inherit the lands allotted to the heirs of his wife, Minnie Solander? This court, speaking through Rosser, C., following the rule laid down in *Barnett* v. *Way, supra*, held that he did. In passing the court said: 'The right of the heirs of Minnie Solander to select her allotment after her death was created by section 28 of the Original Creek Agreement. She had no title to the lands at her death, and it only came into existence after the Original Creek Agreement became the law; and the right in her heirs to have it selected after her death was created by the provisions of section 28 of that agreement. As the right was created by that section, it was competent to provide in the section who were the persons entitled to take under its provisions. By its terms the same persons are entitled to take as heirs of Minnie Solander as would have been entitled, had she selected the allotment in her lifetime, and lived until after the Original Creek Treaty took effect, and had then died seized of

the land, leaving the same heirs, bearing the same relation to her and to each other at that time as they actually bore at the actual time of her death. If the land had been allotted to her and she had died while the Original Creek Treaty was in force, leaving George A. Solander and Hettie L. Solander, her husband and daughter, living, her heirs would have been her husband, George A. Solander, and her daughter, Hettie L. Solander. Then, if Hettie L. Solander had died afterwards, without husband or issue, while that treaty was in force, her father would have inherited her land. The fact that George A. Solander was a white man would not have prevented him from inheriting as heir to his wife, nor as heir to his daughter. *deGraffenreid* v. *Iowa Land & Trust Co.*, 20 Okla 687, 95 Pac. 624."

The case of *Mullen* v. *United States, supra,* is again controlling. There the court held that it was immaterial whether the citizen entitled to take the land lived to receive it; that where it was allotted to the heirs the descent was in every respect the same as in the cases where the lands had been allotted and patented to the living citizens. In the course of its discussion this court cited section 5 of the Act of April 26, 1906, which provides that the result is the same whether the patents issue to the original allottees or to the heirs.

The following Texas cases hold that the persons intended by grant upon the part of a state to the heirs of a certain person, are those who would

have inherited the right granted had it existed at his death:

Goodrich v. *O'Conner,* 52 Tex. 375;

Wardlow v. *Miller,* 6 S. W. 292, 69 Tex. 395;

Waterman v. *Charlton,* 120 S. W. 171, 102 Tex. 510.

In *Waterman* v. *Charlton, supra,* the Supreme Court of Texas, held:

> "The persons intended by a state grant to the heirs of a certain person are those who would have inherited the right granted had it existed at his death."

In the case of *Clark* v. *Lord,* 20 Kan. 390-395, the Supreme Court of that state construed statutes somewhat similar, saying:

> "The patent was not issued to Eleanor Richardson but to 'the heirs of Eliza Richardson' and said Eleanor Richardson obtained her interest, *not as an allottee, nor as the patentee,* but by virtue of the laws of the state of Kansas, which authorized her as an heir of Eliza Richardson to inherit the estate of her sister. If Eliza had lived the lands would have been allotted and patented to her. After her death they were patented to her heirs without naming them and the law of the state determined who these were."

This decision was handed down when Judge Brewer was a justice upon the supreme bench of Kansas, he, with all the justices, concurring in the opinion.

Application of rule permitting non-citizens of the Creek Nation to inherit from their Creek ancestors.

The field for the operation of the rule permitting non-citizens of the Creek Nation to inherit allotted lands from their ancestors is very limited. We know of no cases that have arisen except where the surviving husband or wife has taken either a part or the entire allotment from the deceased spouse. The devolution of this property to the surviving husband or wife is not only *in accord with natural affection but is necessary for the stability of the family life.* In almost every case the surviving non-citizen husband or wife is left with the responsibility of supporting the children of the deceased allottee. *To take away from the surviving parent all right to a home is to undermine the family life.* Some of the white women who intermarried with Creeks had children born the issue of their marriage with Creek Indians too late for allotment. Such children were themselves non-citizens of the Creek Nation—that is they were not enrolled members of the tribe. To give the Creek statutes the construction contended for upon behalf of plaintiff in error it must follow that these children, without tribal enrollment, could not inherit the lands allotted to their own father. Even the unnatural and short-lived inhibition in section 6 of the Supplemental Creek Treaty, *supra,* which sought to cast

inherited allotments so as to exclude white people, made provision for the unenrolled relatives of the deceased, if of Creek blood. This section provides that only citizens of the Creek Nation and their *Creek descendants* shall inherit the lands of the Creek Nation. By *Creek descendants* is meant persons of Creek blood, although not enrolled. *Lamb v. Baker*, 27 Okla. 739, 117 Pac. 189. But this strict statute only excluded white persons from taking as the *first* heirs of the citizen who died without receiving his allotment. That is to say, had section 6 been in force when the allotment involved here was selected it would have barred George Solander from taking as an heir of his wife, Minnie Solander, and would have cast the entire estate upon their daughter, Hettie. But upon the death of Hettie, George Solander would have taken the entire allotment *as the heir of Hettie.* Therefore there never has been a statute in force at any time which would bar George Solander from taking all of the land involved. If counsel for plaintiff in error were correct in his proposition that a non-citizen of the Creek Nation could never take in the first instance as an heir of a Creek citizen who died before receiving his allotment, still the defendant in error must recover because he takes through his daughter, Hettie, who had taken from her mother.

The decision in *deGraffenried* v. *Iowa Land & Trust Company* has become a rule of property.

—*deGraffenried* v. *Iowa Land & Trust Company*, 20 Okla. 687, 95 Pac. 624;

Lamb v. *Baker*, 117 Pac. 189, 27 Okla. 739;

Sanders v. *Sanders*, 117 Pac. 338, 28 Okla. 59;

Hughes Land Company v. *Bailey*, 120 Pac. 290, 30 Okla. 194;

Divine v. *Harmon*, 121 Pac. 219, 30 Okla. 820;

Morley v. *Fewell*, 122 Pac. 700, 32 Okla. 452;

Shellenbarger v. *Fewell*, 124 Pac. 617, 34 Okla. 79;

Reynolds v. *Fewell*, 124 Pac. 623, 34 Okla. 112;

Bilby v. *Brown*, 126 Pac. 1024, 34 Okla. 738;

Ground v. *Dingman*, 127 Pac. 1078, 33 Okla. 760;

Woodward v. *deGraffenried*, 131 Pac. 162, 36 Okla. 81.

The decree in the *deGraffenried* case was entered by the United States Court for the Western District of the Indian Territory on the 11th day of May, 1907. Counsel for the plaintiff in error was then the presiding judge of that court, and held that a non-citizen of the Creek Nation could not inherit a Creek allotment, but prior to that date on the 6th day of September, 1905, with Judge RAYMOND pre-

siding, the said United States Court for the Western District of the Indian Territory, in the case of *Porter* v. *Brook,* held that such non-citizen did inherit under said Creek law. It is an historical fact that the *Porter-Brook* decision quoted in part *supra* was given wide publicity, and that same *was widely accepted as a correct construction of the law.* When Judge LAWRENCE, in May, 1907, caused a decree to be entered excluding a non-citizen of the Creek Nation from inheriting, the cause was immediately appealed to the Court of Appeals for the Indian Territory, and was numbered 856 in that court and transferred to the State Supreme Court with the admission of Oklahoma into the Union. The decision of the Supreme Court of Oklahoma was handed down April 13, 1908, since which time at least ten or twelve cases of like import have been reported by the Supreme Court of the state. In the decision of *Woodward* v. *deGraffenried,* decided by the Supreme Court of Oklahoma September 17, 1912, that court said, in referring to the original *deGraffenried* case:

> *"The decision in that case has become a rule of property. * * * The decisions cannot and should not be overturned. Descent of property after it has lost its tribal character should follow the line of natural affection, and there is no reason for presuming that a member of the Creek tribe has not the same affection for his or her white relations as for relations of the Indian blood of the same degree of relationship."*

The case of *Mullen* v. *The United States* (204 U. S. 448, 56 L. ed. 834) decided April 15, 1912, construing Choctaw-Chickasaw treaties similar to the Creek treaties, and holding that where allotments were made to the heirs that non-citizens inherited just as citizens of the tribe, was immediately accepted throughout that part of Oklahoma formerly the Creek Nation, as announcing the doctrine of the *deGraffenried* case by the Supreme Court of the state. *Many transfers have been made upon the faith of the state court's decisions upon this point, and upon the construction which the people generally have given the Mullen case*, and to overturn these decisions would be to produce great confusion, to deprive many *bona fide* purchasers of vast estates and to unsettle, to an intolerable degree, the already uncertain land titles in that part of Oklahoma which was formerly the Indian Territory.

In the case of *deGraffenried* v. *Iowa Land Co., supra,* the land was actually selected by the ancestor who died after receiving the certificate of selection which was the evidence of title. There the allottee died seized of an estate in the land. The patent subsequently issued was but the evidence of the right of which the allottee died seized. Here the citizen entitled to select an allotment died before selection and without any title to descend to her heirs, but the result is the same, for the allotments were made *in the same right*—in each case it was the enrolled citizen's share in the public do-

main—in the two cases the deaths occurred *under the same law* of descent. The land was selected under the *same law* giving the right thereto; the title in each case had its incipiency *under the same law.* It is inconceivable, therefore, that the descent in the one case would pass in any manner different from the other merely because in the one case the citizen selected his land prior to his death and in the other it was selected after death. In order to effect any such difference, the court must hold that the heirs took directly from the Creek Nation instead of from their ancestors from whom they received the land after it had lost its tribal character. The descent is exactly the same in both cases as if both citizens had been enrolled on April 1, 1899, and the allotments selected on that date. Any other construction would lead to absurdity, for if the statutes are not so construed the lands allotted to an Indian on the first day of April, 1899, might descend to heirs entirely different from those who would have inherited had the selection been made on the second day of April, 1899.

The land was alienable at the time of the conveyances involved.

The allotment having been made to the heirs under the provisions of section 28 of the Original Creek Agreement, *supra*, was never restricted.

—*Mullen* v. *United States*, 224 U. S. 448, 56 L. ed. 834;

Reed v. *Welty*, 197 Fed. 419;

Shulthis v. *McDougal*, 170 Fed. 529;

Deming Investment Co. v. *Bruner Oil Co.*, 35 Okla. 395, 120 Pac. 1157;

Bilby et al. v. *Gilliland*, 41 Okla. 150, 137 Pac. 687.

The Department of the Interior long ago accepted this construction of the law governing lands allotted to the heirs of Creek Indians and released jurisdiction of the same. On December 10, 1913, Preston C. West, Assistant Attorney General, in an opinion to the Secretary of the Interior *in re* oil and gas lease covering allotment of Louis Francis, referring to the *Mullen*, *Reed* and *Shulthis* cases, *supra*, said:

> "While it must be confessed that the last three decisions referred to are apparently somewhat paradoxical, it is to my mind, nevertheless, clearly deducible therefrom that an allotment made on account of an Indian who never lived to receive the same himself, and who therefore never was at any time during his life seized of any estate in the land, is a direct allotment to those who, for the want of a better term, are denominated his heirs, but who are

in reality, only persons whom the statute points out as the first takers. *Stevenson's Heirs* v. *Sullivant* (5 Wall. 207). And further, that lands so allotted were without any restriction upon alienation up to the passage of the Act of Congress approved April 26, 1906 (34 Stat. 137)."

In the recent case of *United States* v. *Bartlett*, this court held that the Act of April 26, 1906, referred to in the above opinion of the Assistant Attorney General, did not reimpose restrictions. It therefore follows that this entire allotment has always been unrestricted. Counsel for plaintiff in error contends that even if the court should hold that George Solander, a non-citizen of the Creek Nation, took an undivided half interest in his wife's allotment upon the selection thereof, the other half going to the allottee's daughter, Hettie, that the half interest received by the husband passed to him *restricted like an original allotment in the hands of a full-blood Creek Indian.* These actions below were in ejectment. Plaintiff in error invokes the rule that the plaintiff below must recover, if at all, upon the strength of his own title and therefore he urges that even had George Solander inherited the undivided half interest in the land from his wife, as we contend, that his grantee could not recover the same in ejectment. To meet this objection we ask the court to hold that the entire allotment was always alienable.

But had the heirs received the land restricted, the grantor, being *not of Indian blood,* could convey in virtue of the Act of April 21, 1904 (33 Stat. L. 189), which provides:

> "And all of the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed."
>
> —*Franklin* v. *Lynch,* decided by this court on April 6, 1914.

This allotment having been made to the heirs, there was no homestead, as was held in the *Mullen* case, *supra.* Since April 21, 1904, all allotted lands in the Five Civilized Tribes, excepting homesteads, and excepting lands allotted to minors, have been alienable in the hands of all those not of Indian blood. The Supreme Court of Oklahoma has so construed the Acts of Congress.

Wherefore, the defendant in error prays that the judgments in his favor be affirmed.

Respectfully submitted,

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